88-1091

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EVANNA POWELL,
Petitioner

versus

ANTHONY NIGRO, ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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529-2773

49pp

QUESTIONS PRESENTED

I

Whether the Court of Appeals erred, when it denied the petition for rehearing of the petitioner's Motion for Summary Reversal of, the underlying Motion for Summary Judgment, in light of Watson v. Ft. Worth, __ U.S. __, (6-29-88)(No. 86-6139) which requires, in cases alleging disparate impact, as herein alleged, that after the plaintiff has made a prima facie case, the opposing party come forth with evidence, stating why the actions complained of, were not discriminatory?

Whether the Court of Appeals erred, when it denied the petition for rehearing of the petitioner's Motion for Summary Reversal of, the underlying Motion for Summary Judgment, in this case, where it did not require the

defendants to come forth with either "clear and convincing evidence" or "a preponderance of evidence" indicating that they had not discriminated against the petitioner?

II

Whether the Court of Appeals erred, when it denied the petition for rehearing of the respondents' Motion for Summary Affirmance of the September 30, 1987 Order denying petitioner's Motion for Judgment by Default where the respondents' responses to interrogatories and request for production and inspection were deemed failures to answer under Fed.R. Civ.P. 37; where neither Fed.R.Civ.P. 26 nor rule 46, exempts, from discovery, the information sought from the respondents; where the bar examiners' answers were neither given by them nor taken under oath as required by law; and where the respondents had in their posse-

ession, the information sought?

III

Whether the Court of Appeals erred when it denied the petition for rehearing of the petitioner's Motion for Summary reversal of the January 16, 1985 Order dismissing, in their individual capacities, from money damages, the respondents who were sued in both their individual and official capacities; and where Fed.R.Civ.P. 25(d) provides for the dismissal or substitution of persons sued only in their official capacity?

IV

Whether the Court of Appeals erred, when it denied the petition for rehearing of the respondents' Motion for Summary Affirmance of the January 17, 1984 Order granting respondents' underlying Motion for Protective Order, when Harlow v. Fitzgerald cited by the respondents as controlling, requires immunity before a person is exempt from certain actions and when there was no good cause

shown for not responding to the Interrogatories?

PARTIES HEREIN

Evanna Powell	Petitioner
Anthony Nigro	Respondent
Jeanne L. Dobres	Respondent
William C. Gardner	Respondent
James A. Hourihan	Respondent
Issie L. Jenkins	Respondent
Allan Kay	Respondent
Laidler B. Mackall	Respondent
Richard Marsh	Respondent
Lee A. Satterfield	Respondent
Charles J. Steele	Respondent
Jacob A. Stein	Respondent
George Windsor	Respondent

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EVANNA POWELL,
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Evanna Powell, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

JURISDICTION OF THIS COURT

The date of the judgment to be reviewed was entered by the United States Court of Appeals for the District of Columbia Circuit on August 25, 1988. (Appendix A, A-1).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and U.S. CONST. art. III, § 2, cl. 2.

CONSTITUTIONAL AMENDMENT STATUTES AND RULES INVOLVED

U.S. CONST. amend. V (Appendix S, A-59)

42 U.S.C. 1983(1976 & Supp. 1980)(A-59 & 60)

Fed.R.Civ.P. 25(d) p. 20

Fed.R.Civ.P. 37(a)(3)(Appendix Y, A-62)

Fed.R.Civ.P. 37(b)(2)(A-C) p. 18

D.C. Code 11-2501(1981)(Appendix V, A-60)

Rule 46(b)(6)(Appendix W, A-60)

Rule 46(b)(8)(Appendix X, A-61)

STATEMENT OF CASE

I. BASIS OF FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

In the United States District Court for the District of Columbia, the petitioner, Black, instituted suit for violation of 42 U.S.C. 1983 and denial of due process and equal protection in violation of the Fifth Amendment of the United States Constitution in the administration, grading and review of the District of Columbia Bar examination.

Jurisdiction in the district court is based on 28 U.S.C. 1331(a), 28 U.S.C. 1343 and L.R. 3-4(a)2 and L.R. 3-4(a)(3)(Local Rules of the Federal District Court).

After availing herself, several times, of the paper review procedure of the Committee on Admissions of the District of Columbia Bar, and never being given reasons why her answers were wrong, and therefore why she was unsuccessful, when her answers were supported by case law, statutes, regulations, ordinances and/or logic, the petitioner first instituted, in the federal district court, a federal Freedom of Information suit, Powell v. Nigro, No. 79-3208 (D.D.C. 1-25-80); No. 80-1147(Dst.Ct. App. D.C. 5-20-80); No. 79-2057 (U.S. Sup. Ct. 12-1-80), to obtain the information necessary to determine the reasons why she was unsuccessful.

The Federal District Court dismissed the action on the ground of failure to state a

claim upon which relief could be granted, and not on the ground of lack of subject matter jurisdiction. (Appendix O, A-55) The Court of Appeals affirmed the district court's decision. (Appendix P, A-56) The Supreme Court denied the Petition for Writ of Certiorari. (Appendix Q, A-57)

When the Freedom of Information suit did not provide the petitioner with the information to determine why she was unsuccessful, the petitioner instituted, the present action in federal district court.

II. MATERIAL FACTS RELATING TO THE QUESTIONS PRESENTED

On November 28, 1983, the petitioner served Interrogatories on all respondents, and on September 30, 1985, served on the secretary, a Request for Production and Inspection. After several extensions to complete discovery, on February 29, 1984, the secretary answered with evasive, incomplete

and inaccurate answers. The Interrogatories to the bar examiners were never answered by the examiners: The examiners' attorney, the wrong person to respond, answered some questions. Moreover, the responses were not under oath.

Because the secretary's responses were evasive, incomplete and inaccurate and because he did not produce documents requested or permit inspection,and because the bar examiners did not respond to Interrogatories, the petitioner, on January 29, 1985, based on Fed.R.Civ.P 37(b) and case law, filed a Motion for Judgment by Default or Alternatively a Motion to Prohibit Use, By Or On Behalf of the Respondents, Information Sought but not Produced. On December 13, 1984, the respondents filed an Opposition. On September 30, 1987, the District Court issued an order denying the Motion.

On December 30, 1983, the bar examiners,

citing Harlow v. Fitzgerald, 457 U.S. 800 (1980), filed a Motion for a Protective Order relieving them from responding to the Interrogatories. On January 4, 1984, the petitioner filed an Opposition, stating that because the respondents were not entitled to immunity as Harlow required, then the respondents were not entitled to a protective order.

On February 29, 1984, the respondents filed a Motion to Substitute Parties. By Order dated January 16, 1985, the examiners were dismissed in their individual capacities from the demand for money damages. On January 29, 1985, the petitioner filed a Motion to Alter Judgment relating to the dismissal of the bar examiners relying on Fed. R.Civ.P. 25(d) which permits only substitution or dismissal of persons sued in their official capacity, and on case law--Ex Parte La Prade and ExParte Young to name two cases--which hold officials liable for exceeding

their authority.

On September 15, 1985, the respondents filed a Motion for Summary Judgment regarding there being no discrimination as stated in the complaint. On October 28, 1985, the petitioner filed an Opposition stating there were genuine issues of material facts in dispute. The petitioner submitted to the respondents' attorney, pursuant to the Court's request, statistical and other data supporting the petitioner's claims and indicating the respondents had discriminated against the petitioner. On September 30, 1987, the court issued an order granting the Motion for Summary Judgment.

On October 29, 1987, the petitioner filed with the District Court a Notice of Appeal of the September 30, 1987 Order denying petitioner's Motion for Judgment by Default; the September 30, 1987 Order granting the respondents' Motion for Summary Judgment; part of the January 16, 1985

Order dismissing the bar examiners in their individual capacities from the demand for money damages and part of the January 17, 1984 Order granting the bar examiners' Motion for Protective Order regarding Interrogatories.

In the Court of Appeals for the District of Columbia, on December 18, 1987, the respondents filed a Motion for Summary Affirmance of the Orders stated in the Notice of Appeal. On December 30, 1987, the petitioner filed an Opposition.

On December 18,1987, the petitioner filed a Motion for Summary Reversal of the January 16, 1985 Order dismissing the bar examiners from money damages and a Motion for Summary Reversal of the September 30, 1987 Order granting the respondents' Motion for Summary Judgment.

On June 6, 1988, the Court of Appeals issued an Order granting the Motion for Summary Affirmance and denying the Motions for

Summary Reversal. The Court, in the Order, directed the clerk to withhold issuance of the mandate until seven days after disposition of any timely petition for rehearing.

On June 16, 1988, the petitioner notified the Court of her intention not to petition for a rehearing.

After the United States Supreme Court, on June 29, 1988, rendered its decision in Watson v. Ft. Worth, __ U.S. __,(No. 86-6139), the petitioner on July 6, 1988, filed with the Court of Appeals, Notice of the Watson decision requesting the court to decide the petitioner's case within the disparate impact analysis as instructed in Watson or remand the case with instructions.

ARGUMENT

I

The Court of Appeals has sanctioned such a departure by the district court and such a departure from its own decision as to call for an exercise of this Court's power

of supervision.

The Court of Appeals decided petitioner's case in conflict with Watson v. Ft. Worth Bank & Trust, __U.S.__,(6-29-88) (No. 86-6139), which holds the desparate impact analysis is applicable to discretionary and subjective employment practices. Moreover, Watson ruled that where a party has made a prima facie showing of discrimination, the opposing party must come forth with evidence indicating why the actions complained of were not discriminatory.

The Court of Appeals decided petitioner's case in conflict with its own decision in Hopkins v. Price Waterhouse, 825 F.2d 458 (8-4-87), 618 F.Supp. 1109(9-20-85), a sexual discrimination case which holds, in relevant part, that the plaintiff's showing she was treated less favorable than male candidates because of her sex, was sufficient to establish a discriminatory motive, and, in the absence of the defendant's demonstrating

by "clear and convincing evidence" that impermissible bias was not the determinative factor in denial of the plaintiff's partnership application, plaintiff's showing was sufficient for a finding of discrimination by the defendant.

Petitioner, who is Black, filed a Complaint alleging violation of 42 U.S.C. 1983 and denial of due process and equal protection in violation of the 5th Amendment of the United States Constitution in connection with the administering, grading and review of the District of Columbia bar examination.

The petitioner submitted statistical data and other evidence indicating the percentage of Blacks to whites passing the bar examination was less than 1% for Blacks and more than 96% for whites. (AppendixII, A-89) The pattern of disproportionate not passing to passing persisted throughout the bar examination times in question, i.e., 1976 -1981.

The petitioner submitted data indicating that the examination numbers assigned unsuccessful Blacks fell within a certain range and were predetermined as numbers for unsuccessful Blacks. (AppendixHH, A-88) The petitioner presented statistical and other evidence indicating there was no ascertainable standard , in fact or in application, for grading bar examinations. (Appendices JJ, A-90 & GG, A-87 .)

Rule 46 states a grade of 70 shall be passing and that the equipercentile method shall be used. (Appendix X, A-61) The chairman of the Committee on Admissions said a 140 (raw score) on the multistate examination was passing and if an examinee made 140 or above, his essay answers were not read. (AppendixEE, A-84) Testing Director National Conference of Bar Examiners (NCBE) stated three states used 140 on multistate as a passing score without reading essay answers. (AppendixFF, A-86)

The petitioner had a raw score of 149 on the multistate bar examination but did not pass. (AppendixGG, A-87) An equipercentile score of 66.3 has a raw score of 149, (AppendixGG, A-87) yet, the petitioner did not pass.

The petitioner submitted information indicating that from the names, addresses, parents' names, schools attended, background checks, and from examinees being repeaters, the respondents knew the race of applicants, and used this and other information, to discriminate against the petitioner and other Blacks.

The petitioner contends that from the response to bar application question 5, asking about the number of times the bar has been taken and reasons for each failure, the respondents predetermined unsuccessful Blacks.

The petitioner states, based on the statistical and other evidence submitted, she made a prima facie showing of discrimi-

nation under both Watson and Hopkins. Under Watson, the desparate impact analysis should have been applied to the petitioner's case and under both Watson and Hopkins, the respondents should have come forth with evidence indicating why the actions complained of, were not discriminatory.

A party cannot come forth with any kind of evidence and consider the requirement met.

The evidentiary standards of proof, in civil matters, are "clear and convincing evidence" or "a preponderance of the evidence."

In Hopkins, the Court of Appeals ruled "clear and convincing evidence" is the standard for overcoming a prima facie showing of discrimination. Such evidence the respondents did not present.

While Watson does not state an evidentiary standard, its standard must be one of the two-mentioned standards for civil cases. Therefore, under Watson the respondents could not have complied with either standard, since

under case law and Fed.R.Civ.P. 37 (discussed hereinafter under part II of the Argument) their evasive, incomplete and inaccurate responses were failures to answer or were no answers.

II

The decision of the District Court and the Court of Appeals for the District of Columbia Circuit is in conflict with decisions of the First, Second, Fourth and Seventh Circuits regarding responding to interrogatories and request for production and inspection.

On November 28, 1983, the petitioner served her first set of Interrogatories on the respondents, and according to Fed.R.Civ. P. 33, the respondents were to respond within 30 days. On February 29, 1984, the secretary answered the petitioner's First Interrogatories.

By Orders dated January 9, 1984, January 31, 1984, January 16, 1985 and in court around January 16, 1984, the Court extended

to January 18, 1984, February 22, 1984, for 20 days and to January 23, 1984, respectively, the time for the respondents to respond to Interrogatories. By Order dated November 19, 1985, the Court extended, by 40 days, the time for both sides to complete discovery.

When the secretary finally responded to the First Interrogatories on February 22, 1984, his answers were either evasive, incomplete, inaccurate and his objections were without a statutory basis for exemption from discovery.

The bar examiners never answered the Interrogatories addressed to them. The attorney, on October 28, 1985, answered Interrogatories addressed to the bar examiners, and responded to the Request, addressed to the secretary, for Production and Inspection. (Appendices CC & BB)

The First Circuit in U.S. for benefit of General Electric Supply Corp. v. W.E. O'Neil Const. Co., 1 F.R.D. 529 (1940)

ruled,

> The proper remedy for failure to answer interrogatories is a motion for judgment by default, and not a motion to require answers to interrogatories. (emphasis added)

The District of Columbia Circuit stated in its September 30, 1987 Order relating to the default judgment, the remedy for the respondents responses [which were evasive, incomplete, inaccurate and without statutory basis for exemption] is a Motion Compelling an Answer or Compelling Inspection.

An order is an instruction or command issued by the court, to do or refrain from doing something. Since the Court issued five (5) orders commanding the respondents to respond to the interrogatories, within a certain time, for the petitioner to file a Motion to Compel an Answer or Inspection, appears unwarranted.

The remedies for failure to respond to Interrogatories or Requests for Production

and Inspection, in addition to a Motion to Compel which appears inappropriate under the facts herein, are as follows:

Fed.R.Civ.P. 37(b)(2)(A-D):

> A. ...Matters regarding the Order for failure to respond, and designated facts shall be taken to be established for the ... claim of the party obtaining the order;
>
> B. ...Refusing to allow the disobedient party to support or oppose designated claims or defenses...;
>
> C. ...Dismissing the action... or rendering a judgment by default...;(emphasis added)
>
> D. ...Treating as contempt of court the failure to obey.

The Second and Fourth Circuits in Jones v. Goldstein, 41 F.R.D. 271(1966) and Cabales v. U.S., 51 F.R.D. 498, aff'd 447 F.2d 1358(1970) require that interrogatories be answered by the persons to whom the interrogatories are addressed.

The District Circuit does not require interrogatories be answered by the bar examiners to whom they were address or the

Request for Production of Documents and Request for Inspection be responded to by the secretary. (Appendices CC, A-79 & BB, A-78.)

The Seventh Circuit in U.S. v. 58.16 Acres of Land, 66 F.R.D. 570(1975) ruled that interrogatories must be answered under oath. Neither the answers of the bar examiners nor the response of the secretary for production and inspection were answered under oath.

III

On the matter of substitution of parties, the federal courts in the District have rendered a decision which conflicts with decisions of this Court, and the Court of Appeals has so sanctioned the departure by the lower court, as to call for an exercise of this Court's power of supervision.

The petitioner sued the respondents individually and in their official capacities as the Committee on Admissions of the District of Columbia Bar.

By Order dated January 16, 1985, the Court dismissed the respondents as parties to the demand for money damages relating to allegations in ¶¶ 10a-10b, 13, 15-16, 17a-18, 20a-20b of the Complaint. The Order also substituted the Committee on Admissions as the party defendant to the equitable claims. (Appendix I, A-43)

Under Fed.R.Civ.P. 25, substitution of parties is authorized in only four (4) situations: death, incompetency, transfer of interst (any parties) and death or separation from office of a public officer.

Rule 25(d) states,

> When a public officer is a party to an action in his official capacity, and during its pendency dies, resigns, or otherwise ceases to hold office...his successor is automatically substituted as a party. (emphasis added)

Rule 25(d) does not authorize the substitution of persons sued in their individual capacity. Rule 25(d) only authorizes substitution of persons sued in their

official capacity.

The petitioner finds substitution of the present Committee for the predecessors sued in their official capacity to comport with the statute.

The respondents, sued in their individual capacities, should not be substituted by someone in their individual capacity because the named respondents are the individuals who committed the wrongs complained of. They are the real parties in interest under Fed.R.Civ.P. 17a and in whose absence, complete relief cannot be granted. Fed.R. Civ.P. 19. Because the petitioner's right to protect her interest will be seriously impaired by the substitution of the respondents in their individual capacities, rule 19 requires that the respondents not be substituted in their individual capacity.

Ex Parte La Prade, 289 U.S. 458 (1933) decided under the predecessor to rule 25(d), but which still holds true in this respect

states, substitution of officials, does not authorize the imposition of liability or restraint upon the successor on account of anything done or threatened by the predecessor individually.

Wrongs committed or threatened by an officer under an unconstitutional statute do not constitute ground for an injunction against his successor; nor does a declaration of the statute that he shall bring penalty suits to enforce it, since he might hold it unconstitutional and deem himself justified by his official oath in refraining. ExParte La Prade, at 458.

Ex Parte Young, 28 S.Ct. 441 (1908) in addressing the liability of a person for his own acts, states,

> If the Act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is

> subject in his person to the consequences of his individual conduct.

The principle stated in Ex Parte Young has been affirmed in Hopkins v. Clemson College, 221 U.S. 636, 642, et seq. Truax v. Raich, 239 U.S. 33, 37. Terrace v. Thompson, 263 U.S. 197, 214, Sterling v. Constantin, 287 U.S. 378, 393.

Other than substitution of parties, the other theory under which the respondents could possibly avoid liability relating to the demand for money damages is by way of immunity.

There are two types of immunity: absolute and qualified (limited).

Simply because a person is a judge, officer of the court or otherwise associated with carrying out the duties of the court, does not automatically mean the person is entitled to immunity.

The prerequisite to determining whether

any immunity should be accorded an official, is a characterization of the action complained of, as investigative, administrative or non-judicial on the one hand, or as judicial on the other hand.

Stump v. Sparkman, 435 U.S. 349(1978); Pierson v. Ray, 386 U.S. 547 (1967) and Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872) hold that a judge cannot be liable in civil actions for their judicial acts which may be in excess of their jurisdiction, malicious or corrupt. None of the cases holds a judge is not liable for acts which violate the Constitution. The excess jurisdiction referred to in these cases is excess of subjectmatter jurisdiction, not excesses of all jurisdictions, and particularly not actions in excess of a judge's Constitutional jurisdiction: the Judges in every State shall be bound by the Constitution, and the Laws, of the

United States which shall be made in pursuance thereof. U.S. Const. art. VI, cl. 2

The determination that there is absolute immunity in Stump (a judge's approval of a petition), in Pierson (a judge's dismissal of an action) and in Bradley (a judge's removal of an attorney from the bar roll), was based on the actions being actions properly performable by judges.

Harlow v. Fitzgerald, 457 U.S. 800 (1982) holds, government officials whose special functions or constitutional status require protection from suits for damages are entitled to absolute immunity from personal liability for unconstitutional conduct. However, such officials bear the burden of showing that public policy requires an exemption of that scope.

The fact that bar examiners and the secretary are not constitutional creatures

as are judges, the examiners and secretary are not automatically entitled to all privileges and immunities to which judges are entitled.

Where the action complained of is judicial and within the Constitutional and subject matter jurisdiction of the official, absolute immunity from damages should be accorded as in Stump, Pierson and Bradley.

Where the action is not judicial, then qualified immunity or no immunity may be accorded, depending on the facts.

Prentis v. Atlantic Coast Line, 211 U.S. 210 (1908), sets forth the criteria for a judicial inquiry. If the court is called upon to investigate, declare and enforce liabilities as they stood on present or past facts and under laws supposed already to exist, the court has conducted a judicial inquiry.

This Court in District of Columbia

Court of Appeals v. Feldman & Hickey, 460 U.S. 462 (1983), citing Prentis ruled that the waiver petitions asserted a claim of a present right to admission to the bar, and therefore the court's action was judicial.

The petitioner states the Committee's action in her case was not judicial because she never petitioned the D.C. Court of Appeals or the Committee regarding a claim of a present right or regarding a rule. Petitioner only asked the Committee to explain why her answers were not accorded enough credit for her to pass the examination. Neither the Court of Appeals nor the Committee was requested or required to conduct, in the petitioner's case, a judicial inquiry in which the court was called upon to investigate, declare, and enforce liabilities as they stood on present or past facts and under laws supposed already to

exist.

Where, as in the petitioner's case, the petitioner did not raise before the Committee or Court of Appeals, and where neither the Committee nor Court of Appeals was asked to, nor did either decide, a claim of a present right to admission to the bar, but where the petitioner took and reviewed a test which the Committee graded and reviewed, the Committee was not involved in a judicial proceeding, but was only involved in a ministerial act performed by virtue of judicial power.

The actions of the bar examiners and secretary in composing, grading and administering the bar examinations in question do not comport with a "judicial inquiry" or "judicial proceeding" as enunciated by this Court in Feldman and Prentis.

The United States Court of Appeals in Simons v. Bellinger, 643 F.2d 777, and the

Supreme Court in Imbler v. Pachtman, 424 U.S. 430 (1976) state that whether a proceeding is judicial or not depends on whether the action of the quasi-judicial body has moved from the investigative or non-judicial stage to the advocacy stage. If the action has so moved, the official's action is at the point where it is intimately associated with the judicial process and at such point, the official is entitled to absolute immunity.

It is the petitioner's position that the actions of the Committee in grading and administering examinations were non-advocatory activities. At no point at the Committee level, did the examiners' or secretary's activities rise to the advocatory level, and because they did not so rise, under Simons and Imbler, the respondents are not entitled to absolute immunity.

Simons, at 777, citing Briggs v.

v. Goodwin, 186 U.S. App. D.C. 179, 190 (1977), cert. denied 437 U.S. 904 (1978) states,

> This Court [U.S. Court of Appeals] has recognized that public policy dictates that absolute immunity is not appropriate for prosecutors when they are 'engaged in essentially investigative as opposed to advocatory activities.' (emphasis added)

Simons, at 778, citing Butz v. Economou, 438 U.S. 478 (1978) states,

> Official who seek absolute immunity exemptions from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.

In the instant case, public policy requires no exemption.

Where officials are not entitled to absolute immunity, Harlow, at 815 states, there is the possibility of a lesser immunity.

> [Q]ualified immunity would be defeated if an official 'knew or reasonably should have known'

> that the action he took within his sphere of responsibility would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury....

All the respondents are lawyers, who know, and have taken an oath to uphold the Constitution. They knew and know that the grading method and other policies relating to admission, as applied to Blacks, violated the Constitution and § 1983.

Because the respondents knew and know their actions were violative of the petitioner's Constitutional rights, the respondents are not entitled to qualified immunity.

The exercise of discretion by a judge, bar examiner or secretary, must be within the confines of the Constitution, and where the exercise exceeds the Constitutional mandate, the official should be liable.

IV

The decision of the District Circuit to grant the protective order is so inconsistent with the decision of this Court as to call for an exercise of this Court's power of supervision.

The respondents requested the District Court, pursuant to Fed.R.Civ.P. 26(c) to enter a protective order relieving the bar examiners from responding to interrogatories on grounds of the interrogatories being unduly burdensome, that the information sought was not at their disposal, and that an identical copy had been propounded to the secretary.

The protective order should not have been granted because the interrogatories were not unduly burdensome, because the bar examiners did have the information at their disposal and because the interrogatories addressed to them were not identical to the secretary's interrogatories.(Appendix CC,A-79)

While the interrogatories asked for information relating to bar examinations given from February 1976 to February 1981, an answer for one year perhaps would have been repeated for other years since procedures and information would not have changed from year to year.

In summary, the Interrogatories to the bar examiners sought information about the extent of their legal education and the institutions of matriculation; their professional reputation in the community; whether they were experts in the subject-matter area of their questions; the cases and briefs in which they were involved; the means by which they received the answers they graded; the place where they graded the answers; whether some or all answers were received and graded; the means and time, after grading, the answers and grades were returned to the secretary; the criteria used to grade answers;

and the amount of time devoted, between receipt of answers and completion of grading of answers, to his or her personal life.

The interrogatories to the secretary were distinctly different from the interrogatories to the bar examiners. In summary, the interrogatories to the secretary sought information relating to test validation; statistical data on the pass-fail rate in general and by race; the methodology of grading under the equipercentile method; the places where examinations were graded; the method of delivery and return (if not at the Court); whether some or all examinations were delivered to examiners; the criteria for selecting bar examiners; examination identification numbers of Blacks and whites who failed; the number of Black and whites who passed; the law schools of successful and unsuccessful Blacks and whites; the number of Blacks

and whites who did and did not list a parent or relative as a lawyer; and the number of Blacks and whites who were repeaters.(Appendices Z, A-63 & AA, A-73)

Inasmuch as the bar examiners' interrogatories related to things they had done, the information should not only have been at their disposal but also should have been in their minds.

In addition to rule 26(c), the respondents cited and relied on Harlow v. Fitzgerald, 457 U.S. 800 (1982) as requiring a a protective order, but nowhere does Harlow discuss a protective order or the issuance of a protective order.

Harlow,at 812, 813 and 815 does discuss immunity. However, it is immunity for actions performed by Presidential aides in their official capacities.

Harlow is not applicable to the issuance of a protective order in the instant case on the ground of immunity; neither absolute

immunity nor qualified immunity.

Harlow states absolute immunity requires that the aide show the responsibilities of his office embrace sensitive areas such as national security or foreign policy and that the aide was discharging the protected function when preforming the act for which liability is asserted.

The admission of persons to the bar involves neither national security, foreign policy nor any matter of a sensitive or secret nature, but involves matters of a public nature which directly and immediately affect all citizens daily.

Harlow states qualified immunity will be defeated if an official "knew or reasonably should have known that the action he took within the sphere of official responsibility would violate constitutional rights of the plaintiff...." The respondents, who are lawyers, knew or should have known their actions relating to the bar examinations

would deprive the petitioner of a license to practice law in violation of the Constitution and in violation of § 1983.

Under Harlow, Monell v. Dept. of Social Services of City of New York, 436 U.S. 658 (1978) and Wood v. Strickland, 420 U.S. 308 (1975), the respondents do not qualify for immunity. Under said cases, the respondents are not entitled to a protective order.

V

In view of the foregoing arguments, the petitioner respectfully requests the Court to issue a writ of certiorari to review the August 25, 1988 judgment of the United States Court of Appeals for the District of Columbia Circuit.

Evanna Powell, Pro se
5749 5th Street, N.E.
Washington, D.C. 20011
529-2773

AFFIDAVIT OF SERVICE

CITY OF: Washington

STATE OF: District of Columbia

I, Evanna Powell, being first duly sworn, state that three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit including Appendix were mailed, with prepaid postage, this , day of , 198 , to

Lloyd N. Moore, Jr.,
Attorney for Defendants
Leftwich Moore & Douglas
1250 Eye Street, N.W.
Suite 201
Washington, D.C. 20005

Evanna Powell, Pro se
5749 5th Street, N.E.
Washington, D.C. 20011
529-2773

Subscribed and sworn to before me this day of , 198 .

Notary Public

88-1091

Supreme Court, U.S.
FILED
NOV 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EVANNA POWELL,
Petitioner

versus

ANTHONY NIGRO, ET AL
Respondents

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Evanna Powell, Pro se
5749 5th Street, N.E.
Washington, D.C. 20011
529-2773

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APPENDIX A

Judgment: United States Court of Appeals

for the District of Columbia

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7213 September Term, 1987

EVANNA POWELL Civil Action No. 81-2622

Appellant, FILED Aug 25 1988

v. Constance L. Dupre

ANTHONY NIGRO, ET AL Clerk

Appellees.

BEFORE: Silberman, D.H. Ginsburg and

Sentelle, Circuit Judges

ORDER

Upon consideration of appellant's notice of a recently decided case supporting appellant's claims, filed as a petition for rehearing, it is

ORDERED, By the Court, that the petition is denied.

Per Curiam

FOR THE COURT

Constance L. Dupre, Clerk

By:

/s/ Robert A. Bonner

APPENDIX B

Mandate substitute: United States Court of
Appeals for the District of
Columbia Circuit
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

Constance L. Dupre Clerk

August 22, 1988

James F. Davey, Clerk
United States District Court
for the District of Columbia
United States Courthouse
Washington, D.C. 20001

RE: 87-7213, Evanna Powell v. Anthony Nigro
et al

Dear Mr. Davey:

Pursuant to the provisions of Rule 41(a) of the Federal Rules of Appellate Procedure, transmitted herewith, in lieu of formal mandate, is a certi-

fied copy of this Court's order filed June 6, 1988.

An additional certified copy of the Order is enclosed for delivery to Judge Smith.

Sincerely,

Constance L. Dupre, Clerk

By:/s/Edith DeYoung, Deputy Clerk

enclosures

cc: All Counsel (letter only)

APPENDIX C

Judgment: United States Court of Appeals for the District of Columbia

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7213 September Term, 1987

EVANNA POWELL Civil Action No. 81-2622

Appellant FILED JUN 06 1988

v. Constance L. Dupre

ANTHONY NIGRO, ET AL Clerk

Appellees.

BEFORE: Silberman, D.H. Ginsburg and Sentelle, Circuit Judges

ORDER

Upon consideration of appellant's motion for summary reversal and the opposition, appellees' motion for summary affirmance and the opposition, it is

ORDERED by the court that the motion for summary affirmance be granted substantially for the reasons stated in the district court's Memorandum Orders filed January 17, 1984 and September 30, 1987. We agree with the district court that appellant made no showing of equal protection or due process violations by appellees and affirm the district court's order filed January 16, 1985 on that basis. It is

FURTHER ORDERED that the motion for summary reversal be denied.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See. D.C. Cir. Rule 15.

Per Curiam

APPENDIX D

MEMORANDUM

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

WASHINGTON, D.C. 20001

EVANNA POWELL,) FILED SEP 30 1987

Plaintiff,) CIVIL ACTION

v.) No. 81-2622

ANTHONY NIGRO, et al,)

Defendants.)

MEMORANDUM

The plaintiff, Evanna Powell, an unsuccessful Black applicant for admission to the District of Columbia Bar, brought this action pro se against several members of the Committee on Admissions to the Bar of the District of Columbia Court of Appeals ("Committee") alleging, inter alia, that the Committee failed a disproportionate percentage of Black applicants and otherwise employed a varity of improper grading and review procedures in violation of the due process and equal protection requirements of the Fifth Amendmant

and 42 U.S.C.A. §1983.

The procedural history of this case is fully set forth in the Court's previous opinions in Powell v. Nigro, 543 F.Supp. 1044 (D.DC. 1982); Powell v. Nigro, No. 81-2622(D.D.C. Nov. 14, 1983); and Powell v. Nigro, 601 F.Supp. 144 (D.D.C. 1985). The claims against the individual members of the Committee which remained viable following the foregoing proceedings form the subject of the defendants' Motion for Summary Judgment presently before the Court. The defendants' motion further seeks summary disposition of the remainder of the plaintiff's claims as they relate to the Committee as party defendant.

PLAINTIFF'S EQUAL PROTECTION CLAIMS

Plaintiff first alleges that the indivdual members of the Committee "prejudged, on the basis of the examination number[s] assigned [to Black applicants], that a disproportionate percentage of Blacks would be unsuccesful." Pltf's Complt. ¶19. In response to plaintiff's interrogatories on this point

defendant Anthony Nigro, Secretary and Director of Admissions for the District of Columbia Bar, stated that the Admissions Committee has no way of determining how many Black applicants take, pass or fail the bar examination since it does not solicit, through the application process or otherwise, information as to the race of applicants. Nigro, Ans. Pltf's. Interrogs. ¶¶20-37. Likewise, because the race of bar applicants is not solicited by the Committee, the race of an applicant cannot be determined by a process of tracing an applicant's examination number to his or her application or vice versa. Id.

Additionally, under Rule 46(b)(7) of the Rules of the District of Columbia Court of Appeals, each bar applicant is given an examination number, and only that number, not the name of the applicant, is placed on the examination papers. The individual defendants do not participate in the assignment of examination numbers. Nigro, Affid., Oct. 28, 1985. Rather

the examination numbers are assigned by employees of the District of Columbia Court of Appeals on a random basis, without regard to any information contained in an examinee's application. Id. Disclosure of the examination number of any applicant is prohibited. D.C. App. R. 46(6)(7). See also Harper v. District of Columbia Committee on Admissions, 375 A.2d 25, 28-29 (D.C. 1977)(Discussing anonymous grading procedures of the Committee in detail).

In view of the foregoing, the Court concludes that plaintiff's allegation that the members of the Committee discriminate against Black applicants through a process of identifying such applicants on the basis of their examination numbers is entirely void of merit. Accordingly, because there is no genuine issue of material fact as to the Committee's lack of access to information concerning an examinee's race through either the application, examination or grading procedure, the defendants' Motion for Summary Judgment on this claim is granted. See Tyler

v. Vickery, 517 F.2d 1089, 1093 (5th Cir. 1975), cert. denied, 426 U.S. 940, 96 S.Ct. 2660, 49 L.Ed. 2d 393(1976). (Similar procedure of assigning random numbers to applicants found to have presented no genuine issue of material fact as to examiners' lack of access to information regarding examinees' race.); Pettit v. Gingerich, 427 F.Supp. 282 (D.Md. 1977). aff'd 582 F.2d 869 (1978)(same). See also Celotex Corp. v. Catrett, Administratrix of the Estate of Catrett, __U.S.. __, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)(Delineating standards regarding summary judgment proceedings); Jones v. Board of Commissioners of Alabama State Bar, 737 F.2d 996 (11th Cir. 1984) (Similar action dismissed under Fed.R.Civ.P. 12(b)(6)).

Plaintiff next alleges that the District of Columbia bar examination inherently denies equal protection of law to Black applicants because of the disproportionate rate at which they fail. Even assuming, arguendo, that the District of Columbia bar examination has a disproport-

ionate impact on Blacks, such an impact, standing alone, does not serve to create a suspect classification based on race triggering strict judicial scrutiny under the Fifth Amendment must be substantiated by proof not only of discriminatory impact, but of discriminatory intent as well. Washington V. Davis, 426 U.S. 229, 242-245, 95 S.Ct. 2040, 2049-2050, 48 L.Ed.2d 597 (1977); Pettit v. Gingerich, supra, 427 F. Supp. at 293. As previously concluded, the racially neutral application procedure for taking the District of Columbia bar examination, combined with the Committee's anonymous grading procedures, negates plaintiff's intentional discrimination claim.

In the absence of even a prima facie showing of purposeful discrimination, a racially neutral qualifying examination need only be shown to serve a rational relationship to the State's goal of establishing an applicant's proficiency and fitness in a given area. See, e.g. Washington v. Davis supra, (police officer);

United States v. Lulac, 793 F.2d 636 (5th Cir. 1986)(teacher); Thompson v. Schmidt, 601 F.2d 305 (7th Cir. 1979)(real estate broker); Schware v. Board of Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796(1957)(attorney). This is so notwithstanding any fortuitous disparate impact on any one "class" of applicants:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Washington v. Davis, supra, 426 U.S. at 248, 96 S.Ct. at 2051.

In view of these precedents, and numerous other decisions resolving legion attacks on the reasonableness of the relationship between bar examinations and bar applicants' competency to practice law, there can be little serious question that bar examinations do indeed serve such

a valid purpose. See, e.g., Tyler v. Vickery, supra, 517 F.2d at 1101; Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474, 477 (7th Cir. 1974); Feldman v. State Board of Bar Examiners, 438 F.2d 699, 705 (8th Cir. 1971); Chaney v. State Bar of California, 386 F.2d 962, 964(9th Cir. 1967). As such, the Court finds that there is no genuine issue as to material fact in respect to plaintiff's equal protection claims insofar as they attack the reasonableness of the relationship between the District of Columbia bar examination and the need to qualify only those attorneys who possess the requisite fitness and aptitude to practice law. See, Celotex; Tyler, supra. Therefore, the defendants' Motion for Summary Judgment on this ground is granted.

Plaintiff next alleges that since the subjective essay question on the bar examination cannot be graded by any ascertainable objective standard, the grades she received were arrived at in an "arbitrary and capricious" manner in violation of her equal protection rights. The Court need not engage in an

extended analysis of this argument as it has been uniformly rejected by numerous other courts that have also had occasion to consider it. See e.g., Tyler v. Vickery, supra, 517 F.2d at 1102; Whitfield v. Illinois Board of Bar Examiners, supra, 504 F.2d at 477; Feldman v. State Board of Law Examiners, supra, 438 F.2d at 705; Chaney v. State Bar of California, supra, 386 F.2d at 964. It suffices to say here that the practice of law often encompasses much more than the making of simple choices between pragmatic objective solutions to complex legal questions. Rather, an attorney is more frequently called upon to analyze intricate factual situations, apply abstract legal principles to those situations, and to master cogent and persuasive arguments in support of his or her position in a given case. "Both in legal practice and with ...essay type questions, recognition of the legal problem presented and well-reasoned explication of the relevant considerations is of utmost importance." Tyler v. Vickery,

supra, 517 F.2d at 1102(citation omitted). In conclusion, the Court finds that there is no genuine issue as to any material fact that the use of subjective essay questions on the District of Columbia bar examination bears a rational relationship to the goal of determining an applicant's competency to practice law. Therefore, defendants' Motion for Summary Judgment against plaintiff's equal protection claim on this ground is granted.

PLAINTIFF'S DUE PROCESS CLAIMS

In addition to the plaintiff's equal protection claims, she further alleges that the grading and review procedures employed by the Committee deprived her of her Fifth Amendment right to procedural due process. Plaintiff initially contends in this regard that she is entitled to an opportunity to directly confront the examiners and obtain specific reasons from them as to why her answers were graded as they were. She further submits that she is entitled to compare her answers with the answers of successful examinees.

The defendant responds that the existing review procedures employed by the Committee, combined with the opportunity for unsuccessful bar applicants to retake the examination, satisfied procedural due process requirements. The Court agrees.

The general test governing whether a particular adjudication procedure should be utilized in a given case requires a balancing of the potential harm to the individual which the lack of the procedure inflicts upon him against the interests which the government seeks to advance by denying it. See Goldberg v. Kelly, 397 U.S. 254, 262-63, 90 S.Ct. 1011, 1017-18, 25 L.Ed.2d 287(1970). It has been the position of various courts addressing this very same issue that granting an unsuccessful bar applicant the opportunity of reexamination, in and of itself, satisfies the most rigorous of due process requirements. See, e.g., Tyler v. Vickery, supra, 517 F.2d at 1104; Whitfield v. Illinois Board of Law Examiners, supra, 504

F.2d at 478; Brewer v. Wegman, 691 F.2d 216, 217(5th Cir. 1982). Reexamination indeed appears to be a more generous and effective method of exposing grading errors than would a hearing conducted in the manner proposed by plaintiff. It seems quite unlikely that an examinee would fall victim to the same grading error or the same arbitrary and capricious grading mood of an examiner twice in a row. See Tyler, supra, 517 F.2d at 1104. (Estimating that the chance of failing bar examination twice due to arbitrary grading is literally one in a million)(citing Comment, Review of Failing Bar Examinations. Does Reexamination Satisfy Due Process? 52 Bos. U.L.Rev. 286, 301 n. 115).

Additionally, the review procedures presently employed by the Committee already provide unsuccessful applicants a sufficient opportunity to expose grading errors. See Jones v. Board of Commissioners of the Alabama State Bar, supra, 737 F.2d 996, 1003(11th Cir. 1984)(Existing review procedures, combined with right of

reexamination, held to satisfy due process requirements.) Those procedures permit an applicant to review the essay section of the examination along with the examiner's questions and comments. D.C.App.R. 46(b)(12). The applicant may then submit a petition for regrading supported by reasons why the petition should be granted. Id. An applicant who remains unsuccessful after the petition for regrading is denied can then petition for a final review by two new examiners. Id.

Lastly, since regularly scheduled examinations are conducted every six months, it is doubtful that holding hearings on each unsuccessful applicant's petition could provide any more timely relief than would reexamination itself. Furthermore, the review procedure proposed by plaintiff would not only exhaust a significant portion of the short time period between examinations, but would also constitute and unreasonable burden on the bar examiners. See Whitfield, supra, 504 F.2d 474, 478. In conclusion, the

Court finds as to the adequacy of the procedural safeguards afforded bar examinees by Committee's existing review procedures. Therefore, the defendants' Motion for Summary Judgment on this ground is granted.

Plaintiff's next contention is that the bar examination is violative of her due process rights because it has not been validated as a reasonable measure of an attorney's capability to practice law. This argument too has previously been rejected on the simple basis that for the purposes of constitutional analysis, state administered qualifying examinations need only bear a rational relationship to the ends they seek to achieve. See Washington v. Davis, supra, 426 U.S. at 248, 96 S.Ct. at 2051; Tyler v. Vickery, supra, 517 F.2d at 1099. Compare, Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158(1971)(Construing test validation requirements under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C.A. §2000e (EEOC Guidelines)). As the Court has

previously concluded in respect to plaintiff's equal protection claims, supra, there can be little serious question that the bar examination serves as a reasonable measure of a prospective attorney's possession of the requisite knowledge and skills to be able to competently practice law. See Schware v. Board of Bar Examiners; Tyler v. Vickery; Feldman v. State Board of Bar Examiners, supra. Accordingly, because there is again no genuine issue of material fact as to the reasonableness of the relationship between the bar examination and the need to certify only those attorneys who possess minimal professional competence, the defendants' Motion for Summary Judgment on this ground is granted.

Plaintiff next asserts that the bar examination violates her due process rights because the bar examiners themselves did not have sufficient legal experience to judge her proficiency in law. Plaintiff specifically maintains that many of the bar examiners were unqualified because they had neither Master of Law Degrees

nor specialized expertise in their respective areas of questioning. The Court disagrees. Bar examiners are presently appointed by Order of District of Columbia Court of Appeals. Nigro, Ans. Pltf's Interrog. 19. Plaintiff's suggestion that the bar examiners, as appointed by this method, were not fit to ask questions in a given areas absent extensive specialized experience is meritless.

Notwithstanding the undeniable legal experience and qualifications of the bar examiners appointed by the District of Columbia Court of Appeals, plaintiff fails to recognize the fact that the bar examination is merely a test of an applicant's minimal proficiency in the practice of law. Plaintiff's contention that bar examiners are not qualified to measure that minimum level of skill absent extensive post graduate training or exclusive specialization in a given area is, at best, a suggestion on how the administration of the bar examination might be improved. Once again, plaintiff overlooks

the rational relationship standard of judicial review of such questions which focuses, "not on whether the State has superior means available to accomplish its objectives, but whether the means it has chosen is a reasonable one." Tyler v. Vickery, supra, 517 F.2d at 1100. The Court accordingly finds that there is no genuine issue as to material fact in respect to the reasonableness of the District of Columbia Court of Appeals' present method of appointing bar examiners. Therefore, the defendants' Motion for Summary Judgment on this ground is granted.

Plaintiff's next claim alleges that information solicited on the bar application pertaining to past unsuccessful bar examinations is adversely used to prejudge one's proficiency in law. This contention also is without merit for many of the same reasons defeating plaintiff's equal protection claims, supra, since each applicant's examination is graded on an anonymous basis without knowledge of the applicant's

particular legal or personal background. D.C.App. R. 46(b)(7); Nigro, Affid., Oct. 28, 1985. Summary Judgment is therefore granted on this ground as there is no genuine issue of fact relating to the anonymous grading procedures employed by the Committee.

Lastly, plaintiff argues that the Committee has no ascertainable standard of determining the combined score of the essay and multi-state examination scores or the value of a prior multi-state examination scores. This claim too must be rejected. The Committee employs the "equi-percentile" method of calculating scores by which an applicant's multi-state examination score is converted on an equivalent basis with his or her essay score. Nigro. Ans. Pltf's Interrog. ¶6. Those equivalent scores are then combined and divided by two. Id. Successful applicants are required to have a 70% combined score on the essay and multistate portions of the examination. Nigro, Ans. Pltf's Interrog. ¶ 5. The equi-percentile method is also used in

calculating a prior multi-state bar examination score. Nigro, Ans. Pltf's Interrog. 7. The Court finds the Committee's even-handed method of calculating combined essay and multi-state examination scores to not only be ascertainable, but both reasonable and fair as well. As with plaintiff's many other claims, there is no genuine issue of material fact here as to the reasonableness of the Committee's "equi-percentile" method of calculating combined scores on the District of Columbia bar examination. Therefore, defendants' Motion for Summary Judgment on this ground is granted.

PLAINTIFF'S 42 U.S.C §1983 CLAIM

For many of the same reasons already set forth in the Court's opionion, plaintiff's 42 U.S.C. § 1983 action simply cannot be maintained. The success of a 42 U.S.C. §1983 action necessarily assumes the validity of a claim that the plaintiff's constitutional or statutory rights have actually been deprived. As the plaintiff here has asserted no such

violations or her constitutional or statutory rights, her §1983 claim must fail as well. Accordingly, defendants' Mostion for Summary Judgment on this ground is also granted.

An appropriate Order follows.

/s/John Lewis Smith, Jr.

United States District Judge

APPENDIX F

Order

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20001

EVANNA POWELL,	)	FILED SEP 30 1987
Plaintiff,	)	CIVIL ACTION
v.	)	No. 81-2622
ANTHONY NIGRO, ET AL	)	
Defendants.	)	

ORDER

Upon consideration of the defendants' Motion for Summary Judgment, the plaintiff's opposition, defendant Anthony Nigro's Answers to Plaintiff's Interrogatories, the oral arguments of the

parties, and the entire record, it is by the Court this 30th day of September, 1987

ORDERED that the defendants' Motion for Summary Judgment is granted in its entirety as to plaintiff's equitable and money damages claims.

/s/John Lewis Smith, Jr.
United States District Judge

APPENDIX G

Order

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20001

EVANNA POWELL,) FILED SEP 30 1987
Plaintiff,) CIVIL ACTION
v.) No. 81-2622
ANTHONY NIGRO, et al)
Defendants.)

ORDER

Upon consideration of plaintiff's Motion for Judgment by Default under Fed.R.Civ .P. 37, defendants' opposition, and the entire record,

the Court has concluded that there is no basis for the entry of judgment by default since the defendants duly served "answers or objections" to plaintiff's interrogatories as well as a "written response to a request for inspection." Fed.R.Civ.P. 37(d); Maddox v. Wright, 11 F.R.D. 170, 171(D.D.C. 1951).

The Court further finds that plaintiff is precluded from judgment by deafult as she has neither sought nor received an Order compelling defendants to answer the questions they previously objected to or an Order compelling inspection. Fed.R.Civ.P. 37(a)(b).

Lastly, the Court finds that defendants' objections to several of the questions set forth in plaintiff's interrogatories and her request for inspection were interposed in good faith and based on sound principles. Defendants' answers, when read as a whole, demonstrate their conscientious endeavor to understand plaintiff's interrogatories and requests and to fully respond to such requests as were proper and

relevant. Therefore, it is by the Court this 30th day of September, 1987

ORDERED that the plaintiff's Motion for Default Judgment is denied.

/s/John Lewis Smith, Jr.

United States District Judge

APPENDIX H

Memorandum

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL) FILED JAN 16 1985

Plaintiff,) Civil Action

v.) No. 81-2622

ANTHONY NIGRO, ET AL)

Defendants.)

MEMORANDUM

Plaintiff Evanna Powell, unsuccessful in her attempt to pass the District of Columbia bar examination, brings this action pro se against several past and present members of the Committee on Admissions to the Bar of the District of Columbia Court of Appeals. In prior proceedings, after

remand from the Court of Appeals for reconsideration in light of District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), this Court dismissed those counts of the complaint dealing with plaintiff's individual, particularized claims as being premature. Powell v. Nigro, No. 81-2622 (D.D.C. Nov. 14, 1983), in the remaining counts, ¶¶10a-10b, 13-16, and 17a-20b, plaintiff makes a broad challenge to the constitutionality of the bar examination, essentially alleging that defendants' construction of the bar examination violated her rights under the equal protection and due process of law components of the Fifth Amendment. The action is before the Court on the defendants' motion to dismiss on the ground of immunity and a request, pursuant to Fed.R.Civ.P. 25(d)(2), to substitute the Committee on Admissions as the party defendant. For the reasons stated below, the motion is granted in part and denied in part.

Plaintiff's complaint is predicated on a varity of allegations. She asserts that the bar

examination was not "validated," in general or pursuant to court-established criteria for test validation. Plaintiff contends the examination question asking each applicant about the number of unsuccessful examinations was used to prejudge an applicant's proficiency in law. Similarly, plaintiff alleges that the examination numbers assigned bar applicants were used to "predetermine" examination scores. Plaintiff further asserts that the Committee on Admissions had no "ascertainable standard" in grading the bar examination or in establishing the passing score when combining the essay and multistate components of the examination. In addition to her constitutional claims, plaintiff relies on these same allegations to make out a violation of 42 U.S.C. §1983. 1/

A motion to dismiss may be granted only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his

1/The following discussion relating to judicial immunity applies equally to § 1983 claims. Pierson v. Ray, 386 U.S. 547, 554-55 (1967)

claim which would entitle him to relief." Conley v. Gibson, 344 U.S. 41, 45-46 (1957) (footnote omitted), quoted in Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The material allegations of the complaint are presumed to be true for purposes of this motion.

It is well settled that a judge is entitled to absolute immunity for all acts committed within his judicial jurisdiction, even grave procedural errors. Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967). This immunity attaches regardless of corruption or maliciousness. Bradley v. Fisher, 80 U.S.(13 Wall.)(1872). The purpose of absolute immunity is to promote spirited public service and to prevent fearful decisionmaking that would result if the attention of judges was diverted away from public trust and toward personal liability. Judicial immunity benefits the public interest by ensuring judicial independence and by preventing judges from being subjected to vexatious actions. For these same

policy reasons, independence and freedom from obstructive and harassing litigation, absolute immunity has been made applicable to certain other quasi-judicial officials when their activities are integrally related to the judicial process and involve the exercise of discretion comparable to a judge. See, e.g., Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors initiating and pursuing a criminal); Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980)(members of committee appointed by Court of Appeals to monitor unauthorized practice of law); Ashbrook v. Hoffman, 617 F.2d 474(7th Cir. 1980)(partition commissioners effecting a divorce settlement); Stift v. Lynch, 267 F.2d 237 (7th Cir. 1959)(justices of the peace).

Absolute immunity, however, will be "extended no further than its justification would warrant." Harlow v. Fitzgerald, 457 U.S. 800, 811(1982). When assessing whether absolute immunity should be afforded a quasi-judicial official, a court should focus on the official's

function at issue and consider three public policy factors: 1) the "functional comparability" of his judgments to those of a judge; 2) the nature of the controversy in which he participated; and 3) the adequacy of safeguards to control unconstitutional conduct. Simons, 643 F.2d at 778; Rosenfield v. Clark, 586 F.Supp. 1332, 1339(D. Vt. 1984). If the function involves an exercise of judge-like discretion, absolute immunity should; for all other acts, the individual members should enjoy only qualified immunity. Kane v. Yung Won Han, 550 F.Supp 120, 123 (E.D.N.Y. 1982).

Congress has vested in the District of Columbia Court of Appeals the authority and responsibility for determining the method of admitting attorneys to the practice of law in the District of Columbia. D.C. Code §11-2501(1981). The Court of Appeals has established that admission to the bar requires the successful completion of a two-part examination, an essay portion and the multistate examination. D.C.App.R. 46I

(b)(8)(i); 46(8)(i)2/

The Court of Appeals has further prescribed the areas of law on which the applicants are to be examined in the essay portion and has set a scaled passing score of 133 for the essay component and a separate scaled passing score of 266 for the combined essay and multistate examination. D.C.App.R. 46I(b)(8)(v), (b)(10)(i); 46(8)(v), b(10)(i).

Both portions of the examination are administered by the court-appointed Committee on Admissions (Committee) which is made up of seven members appointed for a term of three years. D.C.App.R. 46I(a); 46(a). The Committee has the additional responsibilities of preparing and grading the essay portion of the examination. D.C.App.R. 46I(b)(8)(vi); 46(b)(8)(vi). The Committee certifies applicants to the court for

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2/For convenience sake, the Court has provided citations both to the Rules of the D.C. Court of Appeals in operation at the time the complaint arose and to the new rules which went into effect on January 1, 1985. The applicable text of the rules remain unchanged.

admission to the bar, a function within the exclusive control of the D.C. Court of Appeals. Kennedy v. Educational Testing Service, Inc., 393 A.2d 523, 525 (D.C.App. 1978).

It is well settled that acts of a state's highest court in deciding matters pertaining to admission to the bar are judicial acts. In re Summers, 325 U.S. 561, 565 n. 6(1945); Brown v. Bd. of Bar Examiners of State of Nevada, 623 F.2d 605, 610 (9th Cir. 1980); Richardson v. McFadden, 563 F.2d 1130,1132 (4th Cir. 1977) (Hall, J., concurring), cert. denied, 435 U.S. 968(1978); Louis v. Supreme Court of Nevada, 490 F. Supp. 4, 6(E.D. Va. 1978) aff'd 598 F.2d 1345(4th Cir. 1979); Brown v. Supreme Ct. of Va., 359, 554 (E.D. Va.)(three judge court), aff'd 414 U.S. 1034(1973); Keenan v. Bd. of Law Examiners of State of N.C., 317 F.Supp. 1350, 1355 n.5 (E.D.N.C. 1970). In administering the District of Columbia bar examination and judging the fitness of applicants to practice law, the individual committee members perform a judicial

function on behalf of the District of Columbia Court of Appeals. Richardson, 563 F.2d at 1132 (Hall, J. concurring); Woodward, 454 F. Supp. at 6.

While indeed performing a judicial function, the Committee members are entitled to absolute immunity for those acts where they exercise judge-like discretion, not when they perform a purely ministerial act. A close look at each of plaintiff's allegations reveals that all but one relate to the discretionary decisions arising from that portion of the judicial function of bar admissions delegated to the Committee by the Court of Appeals. Certainly the Committee members exercise judge-like discretion in both composing and grading the examination questions.(¶¶17a-18 of the complaint). Similarly, the Committee exercises the same discretion in choosing to ask applicants questions pertaining to previous attempts at passing the bar examination. (¶¶13, 20a, 20b of the complaint). Likewise, any issue of validation of the examin-

ation would involve a discretionary function delegated to the Committee by the Court of Appeals (¶¶10a, 10b of the complaint.) As these allegations refer to discretionary acts delegated to the Committee, the defendants are entitled to share in the judge's absolute immunity.

Plaintiff, in addition, alleges that the Committee members have no "ascertainable standard" for determining the value to be given prior multistate examination scores used in combination with subsequent essay results. (¶¶15, 16 of the complaint.) An ascertainable standard, however, does exist, as provided by the D.C. Court of Appeals, and the individual Committee members are entitled to immunity in applying the standard. The D.C. Court of Appeals, in an exercise of its discretion, has set the scale scores needed to pass the bar examination. D.C. App. R. 46I(b)(10); 46(b)(10). That same court has established both that "essay scores on each examination will be converted to scale scores using the equipercentile method," D.C.App.R. 46

I9b)(9); 46(b)(9), and the necessary criteria for using a prior multistate scale score in conjunction with a subsequent essay score. D.C.App. R. 46I(10(ii)(B); 46(10)(ii)(B). The individual Committee members cannot be held liable for money damages when performing their delegated duties in conformance with directives from the D.C. Court of Appeals. As plaintiff has made no allegations that defendants went beyond the established rules, the individual Committee members are entitled to absolute immunity as to ¶¶15 and 16 of the complaint.

Plaintiff's allegation that the examination numbers assigned to applicants were used to predetermine test scores (¶¶14, 19 of the complaint) involves no exercise of discretion by the Committee members, and as such, the defendants are only entitled to qualified immunity. Harlow, 457 U.S. at 811. The assigning of numbers is purely a ministerial task, not involving any function similar to that of a judge. Thus, defendants are at most entitled to qualified im-

munity if their acts were performed in good faith. It would be premature for the Court to rule at this time on whether the defendants are protected by qualified immunity as "the scope of that immunity will necessarily be related to facts as yet not established either by affidavits, admissions, or trial record." Scheuer, 416 U.S. at 243. The allegations in ¶¶14 an 19 remain viable against the individual defendants.

There can be little question that disgruntled applicants unhappy with their failing scores would institute civil suits challenging the accuracy of the Committee members administering and grading of the bar examination. The threat of such litigationand time loss defending such actions would impair the members' judgment. The intense nature of administering the bar examination and the likelihood of harassing litigation certainly supports granting the Committee members absolute immunity as to actions involving judge-like discretion.

Granting absolute immunity to the Committee members would not allow for widespread abuse in the administration of the bar examination. For applicants who do not pass the bar examination, the Committee provides its post examination review procedure. Under the review procedure,

> [e]ach unsuccessful applicant is notified of his score on each essay question, his "raw score" for each section of the [multi-state Bar Examination], and his combined score. Upon request, the applicant may meet with the Secretary to the Committee for a review of his essay paper and the questions as framed by the examiners' comments with respect to each question. An unsuccessful applicant may submit within a fixed time, without identifying himself, a petition for regrading to each examiner he wishes with supporting reasons. The Secretary must submit to each examiner so petitioned, the petition, the petitioner's examination book and the examiner's questions and comments with respect to such questions. The unsuccessful applicant is notified by the Secretary of the examiner's ultimate disposition of his petition and the examiner's disposition thereof by two other members of the Committee.

Harper v. District of Columbia Committee on Admissions, 375 A.2d 25, 26-27 (D.C. App. 1977)

Although the District of Columbia has no statutorily established procedure for petitioning the Court of Appeals for review of a final determination of the Committee denying certification that an applicant has passed the bar examination, the Court of Appeals nevertheless does accept and consider petitions for review. Kennedy, 393 A.2d at 525 (citing as an example Harper v. District of Columbia Committee on Admissions, 375 A.2d 25). Thus plaintiff would have the opportunity to point out the inaccuracies in the bar admissions without the need to bring a civil damage suit against the individual Committee members.

In addition to claims for money damages, plaintiff seeks certain equitable remedies which include a declaratory judgment stating that the Committee members violated her constitutional rights. Plaintiff also requests that she be admitted to the District of Columbia bar and granted a license to practice law in the District of Columbia. A finding of absolute

immunity itself would not preclude plaintiff from bringing her equitable claims against the individual members. Pulliam v. Allen, 104 S.Ct. 1970(1984). It is clear, however, by the nature of the requested relief, that plaintiff is suing defendants in their official capacity, and pursuant to Fed.R.Civ.P. 25(d)(2), the Committee on Admissions sould be inserted as the defendant to these equitable claims. The Court does not address at this time whether it is within the Committee's power as a whole to provide the requested relief, though the Court does question whether the Committee is in a position to provide plaintiff with the relief she desires. See Feldman v. State Board of Law Examiners, 438 F.2d 699, 702(8th Cir. 1971)(The Committee "does not itself admit applicants to the bar, ...but merely makes recommendations..the court may or may not elect to follow."). Accord, Kennedy, 393 A.2d at 525.

Defendants request that the Court extend the protective order of January 17, 1984 to

include plaintiff's interrogatories nos. 7-14. Powell v. Nigro, CA No. 81-2622 (D.D.C. Jan. 17, 1984). In that January 17 order, the Court considered defendants' motion for a protective order to plaintiff's first set of interrogatories, granting the request in part but ordering defendants to answer interrogatories nos. 7-14. While the individual members are entitled to absolute immunity as to certain of the claims for money damages, enough of the complaint remains viable against the individual members and the Committee itself to lay a factual predicate for applying the Court's reasoning in the earlier order to the request presently before it. For the same reasons used there, a balancing between "the broad (but not unbounded) scope of discovery and the strictures of Feldman," Powell v. Nigro, slip op. at 3, the request for an extension of the protective order is denied, and the defendants are required to answer interrogatories nos. 7-14.

Except for those allegations relating to

the assigning of test numbers to the bar applicants contained in ¶¶14 and 19 of the complaint, the individual Committee members are entitled to absolute immunity from any claims for money damages. As to the allegations in ¶¶14 and 19, plaintiff has a viable cause of action against the individual members, subject only to a showing of qualified immunity. Though the request for equitable relief is not precluded by absolute immunity, the Committee on Admissions should be made the party defendant to those claims dismissing the individual Committee members as parties to the claims for equitable relief. The requested extension of the January 17 protective order is denied and defendants must respond to interrogatories nos. 7-14.

Accordingly, defendants' motion to dismiss is granted in part and denied in part.

An appropriate order follows.

/s/John Lewis Smith, Jr.

United States District Judge

Dated: 1/16/85

APPENDIX I

Order

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL	)	FILED JAN 16 1985
Plaintiff,	)	Civil Action
v.	)	No. 81-2622
ANTHONY NIGRO, et al	)	
Defendants.	)	

ORDER

Upon consideration of defendants' various motions, plaintiff's opposition, oral argument, and the entire record, it is by the Court this 16th day of January, 1985

ORDERED that the individual defendants are dismissed as parties to plaintiff's demand for money damages as it relates to the allegations in ¶¶10a-10b, 13, 15-16, 17a-18, 20a-20b of the complaint; and it is further

ORDERED that defendants' motion to dismiss is denied as to the allegations contained in ¶¶14 and 19 of the complaint; and it is further

ORDERED that the Committee on Admissions be substituted as the party defendant as to plaintiff's equitable claims; and it is further

ORDERED that defendants' motion for a protective order is denied and defendants have 30 days from the filing of this order to respond to interrogatories nos. 7-14; and it is further

ORDERED that the defendants, both the individual members and the Committee itself, have 20 days from the date of the filing of this order to answer the amended complaint.

/s/John Lewis Smith, Jr.
United States District Judge

APPENDIX J

Order

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL)
Plaintiff,)
v.)
ANTHONY NIGRO, et al)
Defendants.)

FILED NOV 19 1985
Civil Action
No. 81-2622

ORDER

This matter having come before the Court for an oral hearing on motions, and upon consideration of the arguments of counsel, it is this 19th day of November, 1985

ORDERED that counsel for both parties shall have twenty days from the filing of this order to file any motions concerning discovery. It is further

ORDERED that plaintiff shall have thirty days from the filing of this order to serve opposing counsel with copies of any documentary evidence relied on by plaintiff in opposing defendants' Motion for Summary Judgment. It is further

ORDERED that counsel for both parties shall have forty days from the filing of this order to complete all discovery. It is further

ORDERED that plaintiff shall have fifty days from the filing of this order to file a "statement of genuine issues" in compliance with local Rule 1-9(i) setting forth all material facts as to which it is contended there

exists a genuine issue necessary to be litigated and including therein references to the parts of the record relied on to support such statement. It is further

ORDERED that counsel for each party shall have fifty days from the filing of this order to file a table of cases in compliance with Local Rule 1-9(b) specifically indicating those cases on which counsel chiefly rely to support their respective motions; and it is further

Ordered that a hearing on summary judgment motions shall be held at 10:00 a.m. on January 15, 1986.

/s/John Lewis Smith, Jr.

United States District Judge

APPENDIX K

Order

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL) FILED JAN 31 1984

Plaintiff,) CIVIL ACTION

v.) No. 81-2622

ANTHONY NIGRO, ET AL,)

Defendants.)

ORDER

Upon consideration of defendants' motion for extension of time to complete and respond to discovery, plaintiff's opposition, and plaintiff's request that discovery be completed completed within five days, it is by the Court this 27th day of January, 1984

ORDERED that defendants' motion for extension of time is granted. It is further

ORDERED that defendants shall have until February 22, 1984, to complete and respond to discovery requests.

/s/John Lewis Smith, Jr.

United States District Judge

APPENDIX L

Order

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL Filed JAN 9 1984

Plaintiff, Civil Action

v.) No. 81-2622

ANTHONY NIGRO, ET AT)

Defendants.)

ORDER

Upon consideration of the Motion of defendant Nigro to enlarge the time within which to respond to plaintiff's interrogatories, and it appearing to the court that such an enlargement should be granted, it is, by the court, this 9th day of January 1984,

ORDERED: That the motion of defendant Nigro for enlargement of time be, and the same is, hereby granted, and, it is,

FURTHER ORDERED: That said time be, and the same is, hereby extended up to and including January 18, 1984,

/s/John Lewis Smith,Jr.

United States District Judge

APPENDIX M

Memorandum

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL, Plaintiff) Civil Action

v.) No. 81-2622

ANTHONY NIGRO, et al)

Defendants.)

MEMORANDUM

Plaintiff Evanna Powell, an unsuccessful applicant for admission to the District of Columbia Bar, brings this action pro se against several past and present members of the Committee on Admissions to the Bar of the District of Columbia Court of Appeals, alleging that various aspects of the administration of the District of Columbia bar examination violate the due process and equal protection requirements of the Fifth Amendment. In prior proceedings, the Court dismissed plaintiff's claims for lack of subject-matter jurisdiction. Powell v. Nigro, 543 F. Supp. 1044 (D.D.C. 1982). On appeal, the Court of Appeals remanded the case for reconsideration in light of the Supreme Court's 1983 decision in District of Columbia Court of Appeals v. Feldman, 103 S.Ct. 1301 (1983). Powell v. Nigro, No. 82-2020(D.C. Cir., May 11, 1983). The case

is currently before the Court in accordance with that remand order.

The Supreme Court in District of Columbia Court of Appeals v. Feldman set forth basic principles governing federal jurisdiction over challenges to state bar admissions decisions and procedures. In Feldman, plaintiffs filed petitions with the D.C.Court of Appeals, seeking waiver of the District Bar rule that its members be graduates of accredited law schools. Following denial of the petitions, plaintiffs filed suit in federal district court, challenging the denials of the waivers and the constitutionality of the bar admission rule itself. The district court dismissed for lack of subject-matter jurisdiction, and the Court of Appeals reversed and remanded.

The Supreme Court held that the district court had no jurisdiction over the challenge to the D.C. Court of Appeals' order denying waiver, because the order represented a state court decision in a "judicial proceeding" subject by

statute to federal review only in the Supreme Court. 103 S.Ct. at 1313-17. However, the district court did have jurisdiction over plaintiff's general attack on the constitutionality of the accreditation rule, because the court was simply "asked to assess the validity of a rule promulgated in a non-judicial proceeding." Id. at 1316-17.

The decision in Feldman thus requires district courts, on "a close reading of the complaint," Id. at 1317 n.18, to distinguish between "general challenges to state bar rules," and "challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutiona." Id. at 1317 (emphasis supplied.)

In its prior decision, this Court followed the approach later outlined in Feldman. With respect to plaintiff's individual, particularized claims, see Complaint ¶¶8a-9 and 11a-11c, nothing in Feldman disturbs the Court's ruling

that plaintiff's challenge was premature. See Powell v. Nigro, supra, 543 F.Supp. at 1047. See also Chaney v. State Bar of California, 386 F.2d 962(9th Cir. 1971); Woodward v. Virginia Board of Bar Examiners, 589 F.2d 1345 (4th Cir. 1979). Dismissal, therefore, remains the proper disposition of those claims.*/

*/The decision in Feldman involved proceedings in the D.C. Court of Appeals, the body with "exclusive authority to regulate admission" to the D.C. bar. Doe v. Board of Proffessional Responsibility of the District of Columbia Court of Appeals, No. 83-1272 (D.C.Cir., Sept. 16, 1983), slip op. at 7. See also D.C. Code 11-2501(1983); Kennedy v. Educational Testing Service, 393 A.2d 523, 525(D.C.App. 1978). As noted in this Court's prior memorandum, plaintiff failed to petition the D.C. Court of Appeals for review of the Committee's refusal to certify her for admission. Even if plaintiff had so petitioned, this Court, under Feldman, would presumably lack jurisdiction over any subsequent challenge, because the Court of Appeals' disposition of the petition would be regarded as a "judicial proceeding" in a "particular" case.

Moreover, the Committee itself is but an " arm of the Court," under the Court's "exclusive control." Kennedy v. Educational Testing Service, supra, 393 A.2d 25, 26 (D.C.App. 1977). Because of this relationship, it may be argued that the Committee "performs a judicial function on behalf"of the Court of Appeals, Woodward v. Virginia Board of Bar Examiners, 454 F.Supp. 4,6 (E.D. Va. 1978), aff'd, 589 F.2d 1345 (4th Cir. 1979), and therefore its decisions, under Feldman, are not reviewable in federal district

Dismissal, however, is not warranted with respect to the remainder of plaintiff's claims. Plaintiff, in 10a-10b, 13-16, and 17a-20b of her complaint, makes the broad challenge to the constitutionality of the bar examination process necessary to establish federal jurisdiction under Feldman. In particular, plaintiff alleges that the grading standards employed, and certain aspects of the administration of the examination, result in a disproportionate percentage of black applicants failing. By making these allegations, plaintiff is asking the court to "assess the validity of bar admission procedures promulgated in a non-judicial proceeding." Feldman, supra, 103 S.Ct. at 1316-17.

court. See also Richardson v. McFadden, 563 F.2d 1130, 1132 (4th Cir. 1977)(en banc)(Hall, J., concurring. Cf. Feldman, supra, 103 S.Ct. at 1312 (nature of a proceeding "'depends not upon the character of the body but upon the character of the proceeding,'" quoting Prentis v. Atlantic Coast Line, 211 U.S. 210, 226 (1908). This treatment would accord with a basic theme in Feldman: federal district courts may not review a state's denial of a particular plaintiff's application for admission. Feldman, supra, 103 S.Ct. at 1316.

Consequently, the Court has jurisdiction over those "elements of plaintiff's complaint." Id.

Accordingly, defendant's motion to dismiss is granted in part and denied in part.

/s/John Lewis Smith, Jr.

United States District Judge

Dated: 11/10/83

APPENDIX N

Order

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL	)	FILED NOV 14 1983
Plaintiff,	)	Civil Action
v.	)	No. 81-2622
ANTHONY NIGRO, et al	)	
Defendants.	)	

ORDER

On May 11, 1983, the Court of Appeals directed this Court to reconsider its decision in Powell v. Nigro, 543 F.Supp. 1044 (D.D.C. 1982), in light of the Supreme Court's 1983 decision in District of Columbia Court of Appeals v. Feldman

103 S.Ct 1301 (1983). Powell v. Nigro, No. 82-2020 (D.C.Cir., May 11, 1983). For the reasons set forth in the accompanying memorandum, it is by the Court this 10th day of November, 1983

ORDERED that defendant's motion to dismiss is granted in part and denied in part.

/s/John Lewis Smith, Jr.
United States District Judge

APPENDIX O

Order

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL

Plaintiff, Civil Action

v. No. 79-3208

ANTHONY NIGRO,

Defendant.

ORDER

Upon consideration of defendant's motion to dismiss the complaint, memorandum of points and authorities in support thereof, and it appearing

that the complaint fails to state a claim upon which relief may be granted, it is, this 4th day of January, 1980,

ORDERED: That defendant's motion be, and the same is hereby granted; and it is

FURTHER ORDERED: That the complaint be, and the same is, hereby dismissed, with prejudice.

/s/Aubrey E. Robinson, Jr.

Judge

APPENDIX P

Order

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1147 September Term, 1979

EVANNA POWELL Civil Action

Appellant No. 79-3208

v. Filed: April 2, 1980

ANTHONY NIGRO, in his official capacity as Secretary to The Committee on Admissions of the District

of Columbia Bar

BEFORE: Wright, Chief Judge, Tamm and Edwards, Circuit Judges

ORDER

On consideration of appellant's motion for summary reversal, appellee's motion for summary affirmance, the oppositions thereto and of appellant's reply, it is

ORDERED by the Court that the motion for summary reversal is denied, and, it is

FURTHER ORDERED by the Court that appellee's motion is granted and the order of the District Court on appeal herein is summarily affirmed.

Per Curiam

(Appellant's copy was not signed but the copy had an original date stamp affixed)
Chief Judge Wright did not participate in the foregoing order.

APPENDIX Q

Order

Supreme Court of the United States

Office of the Clerk

Washington, D.C. 20543

October 6, 1980

Evanna Powell

5749 5th Street, NE

Washington, D.C. 20011

RE: Evanna Powell

v. Anthony Nigro

No. 79-2057

Dear Ms. Powell:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

/s/Michael Rodak, Jr.

Clerk

APPENDIX R

U.S. CONST.art. III, §2

The judicial Power of the United States shall extend to all cases, arising under this Constitution, and the Laws of the United States .... (emphasis added).

APPENDIX S

U.S.CONST. amend. V

No person shall be...deprived of life, liberty, or property, without due process of law. Nor shall any State deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX T

42 U.S.C. 1983 (Supp. 1980)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (emphasis added).

APPENDIX U

42 U.S.C. 1983 (1976)

Every person who, under color of any statute, ordinance, regulation, custom,or usuage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction hereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX V

D.C. Code 11-2501(1976)(1981)

The District of Columbia Court of Appeals shall make such rules as it deems proper regrading the examination, qualification, and admission of person to membership in its bar....

APPENDIX W

RULE 46(b)(6) (1976-1981)

D.C. Ct. of Appeals

Examination Identification Number

The Secretary shall assign an examination number to each accepted applicant. (emphasis added).

APPENDIX X

RULE 46(b)(8) (1976-1981)

D.C. Ct. of Appeals

Grading Examination Papers

The Committee shall utilize the "Equi-percentile Method," pursuant to "Method Two, Manual for the Interpretation and Use of Scores of the Multistate Bar Examination," in combining the essay score and the multistate raw score to determine the applicant's combined score. The essay examination score will be the basis for the conversion of the multistate score on a one-to-one ratio in value. The scores of the essay section and the converted value of the multistate section will be added together and divided by two to arrive at the applicant's combined score. A combined score of 70 is necessary to be successful in the entire examination.

In grading the examination of applicant granted permission to use a prior MBE raw score in lieu of sitting for the current MBE section of the examination, the Committee shall apply the ap-

plicant's MBE raw score to applicant's current essay score to determine the applicant's combined score in accordance with the formula defined in subparagraph (1) above.

APPENDIX Y

Fed.R.Civ.P. 37(a)(3)

Evasive or Incomplete Answer

For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer. (emphasis added).

APPENDIX Z

Secretary's Answers to Plaintiff's First Interrogatories

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL, FILED 2-29-84

Plaintiff Civil Action

v. No. 81-2622

ANTHONY NIGRO, et al

Defendants.

DEFENDANT ANTHONY NIGRO'S ANSWERS TO PLAINTIFF'S INTERROGATORIES

Defendant, Anthony Nigro, as answers to Plaintiff's First Interrogatories states as follows:

Question 1. Were the essay parts of the bar examinations prepared by professional test preparers, that is, persons whose education and experience were in the areas of drafting and administering tests.

Answer 1. No

Question 2. If yes, give the name(s) of the individual, present or last known address; degrees, institutions that awarded the degrees and dates degrees were awarded; and work experience during the five(5) years immediately preceding the February 1976 and the February 1981 bar examinations which experience was in the area of drafting and administering tests.

Answer 2. Not applicable (N/A).

Question 3. Were the essay parts of the 1981, 1980, 1979, 1978, 1977 and 1976 bar examinations validated?

Answer 3. No.

Question 3a. Was the "criterion-related or empirical method" of validation used?

Answer 3a. N/A.

Question 3b. Was the "content method" of validation used?

Answer 3b. N/A.

Question 3c. Was the "construct method" of validation used?

Answer 3c. N/A.

Question 4. If the examinations were validated, give the name and present or last known address of the person(s) who validated the examinations.

Answer 4. N/A.

Question 5. List the passing score of each multistate examination.

Answer 5. There was no set "passing score." Successful applicants were required to have a 70% combined score on both the essay and multistate portions of the examination.

Question 6. Describe the method used to determine the combined score on each examination when the essay score and multistate score were combined.

Answer 6. The "equi-percentile" method is used. The two highest scores and the two lowest scores are regarded as equivalents. However, under this plan the intermediate equivalent scores are based on percentiles. A percentile is the percentage of scores below the number. The zero percentile essay score is the lowest multistate score. The 100th percentile essay score is the highest multistate score.

Intermediate percentile equivalents are determined by a formula. The multistate scores are converted to equivalent scores, the two scores combined and divided by two to obtain the final score.

Question 7. Describe the method used to determine the value of a prior multistate bar examination score that was used on a subsequent bar examination.

Answer 7. The equipercentile value. See also Rule (b)(8) of the D.C. Court of Appeals.

Question8. Was the value of a prior multistate bar examination score so used, the same on a sub-

sequent examination?

Answer 8. See Answer 7.

Question 9. If the value was not the same, describe the method used to determine the difference.

Answer 9. See Answer 7.

Question 10. For each examination, state the means--mail or personal delivery--by which examiners received their answers.

Answer 10. Personal delivery.

Question 11. State the place--examiners' offices, homes or the Admissions Office--where the essay part of the examinations were graded.

Answer 11. Homes and offices.

Question 12. After the answers were graded by the examiners, by what means were the answers returned to you?

Answer 12. Personal Delivery.

Question 13. Were all answers to the examiners' questions delivered to them?

Answer 13. Yes.

Question 14. If less than all were delivered to

the examiners, state the number and percentage of answers mailed or delivered.

Answer 14. N/A.

Question 15. If less than all were delivered to the examiners, state the authority upon which this decision was based.

Answer 15. N/A.

Question 16. Give the name(s) of the person making the decision not to deliver, and hence, the decision not to grade all examination answers.

Answer 16. N/A.

Question 17. If neither you, nor anyone at your direction, mailed or delivered only some and not all of the answers to the questions, did someone at the direction of a third party, mail or deliver only some of the answers?

Answer 17. N/A.

Question 18. If a third party, mailed or delivered, or ordered another person to mail or deliver only some of the answers, give the name, present or last known address, and relationship

to the Committee on Admissions, of the third party.

Answer 18. N/A.

Question 19. List the criteria for selecting bar examiners.

Answer 19. Bar examiners are appointed by order of the District of Columbia Court of Appeals. The Committee on Admissions does not select its own members.

Question 20. How many Blacks took each examinations?

Answer 20. The Committee on Admissions does not solicit, through the application process or otherwise, information as to the race of applicants. Therefore, the Committee on Admissions has no way of determining the information requested in this question.

Question 21. How many whites took each examination?

Answer 21. See Answer 20.

Question 22. How many Blacks passed each examination?

Answer 22. See Answer 20.

Question 23. How many whites passed each examination?

Answer 23. See Answer 20.

Question 24. How many Blacks failed each examination?

Answer 24. See Answer 20.

Question 25. How many whites failed each examination?

Answer 25. See Answer 20.

Question 26. How many Blacks scored 70 on each examination?

Answer.26. See Answer 20.

Question 27. How many Blacks scored in the 80 range on each examination?

Answer 27. See Answer 20.

Question 28. How many Blacks scored in the 90 range on each examination?

Answer 28. See Answer 20.

Question 29. How many whites scored 70 on each examination?

Answer 29. See Answer 20.

Question 30. How many whites scored in the 80 range on each examination?

Answer 30. See Answer 20.

Question 31. How many whites scored in the 90 range on each examination?

Answer 31. See Answer 20.

Question 32. How many Blacks scored 69.9 or below on each examination?

Answer 32. See Answer 20.

Question 33. How many whites scored 69.9 or below on each examination?

Answer 33. See Answer 20.

Question 34. State the examination (identification) numbers of all Blacks who failed the examinations.

Answer 34. See Answer 20.

Question 35. State the examination numbers of all Blacks who passed the examinations.

Answer 35. See Answer 20.

Question 36. State the examination numbers of all whites who failed the examinations.

Answer 36. See Answer 20.

Question 37. State the examination numbers of all whites who passed the examination.

Answer 37. See Answer 20.

Question 38. State the law schools from which successful Black and white examinees graduated; giving the total number of said examinees for each school.

Answer 38. See Answer 20.

Question 39. State the law schools from which unsuccessful Black and white examinees graduated; giving the total number of said examinees for each school.

Answer 39. See Answer 20.

Question 40. How many successful Black and white examinees listed, on the bar application, a parent who was a lawyer?

Answer 40. See Answer 20.

Question 41. How many successful Black and white examinees who did not list a lawyer-parent on the bar application, were known by you and others who ultimately decided on certification, to have a spouse, grandparent,

aunt, uncle, cousin, or in-law who was, at the times stated, a lawyer?

Answer 41. See Answer 20.

Question 42. How many unsuccessful Black and white examinees, listed on the bar application, a parent who was a lawyer?

Answer 42. See Answer 20.

Question 43. How many unsuccessful Black and white examinees who did not list a lawyer-parent on the bar application, were known by you and others who ultimately decided on certification, to have a spouse, grandparent, aunt, uncle, cousin or in-law who was, at the times stated, a lawyer?

Answer 43. See Answer 20.

Question 44. How many times, on an average, did Black examinees take the bar examination before they passed?

Answer 44. See Answer 20.

Question 45. How many times, on an average did white examinees take the bar examination before they passed?

Answer 45. See Answer 20.

DISTRICT OF COLUMBIA, SS:

Anthony Nigro, being first duly sworn, deposes and says that the foregoing answers to interrogatories are true and correct to the best of his knowledge, information and belief.

/s/Anthony Nigro

SUBSCRIBED AND SWORN TO before me this 29th day of February, 1984.

/s/Maria L. Harrison

Notary Public State of Md.

My Commission Expires July 1, 1986

Respectfully Submitted,

/s/Lloyd N. Moore, Jr.
Committee on Admission
500 Indiana Avenue, N.W.
Room 6000
Washington, D.C. 20001
Tele:(202) 547-1136

APPENDIX AA

Secretary's Answers to Plaintiff's Second Interrogatories

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL	)	
Plaintiff,	)	Civil Action
v.	)	No. 81-2622
ANTHONY NIGRO, et al	)	
Defendants.	)	

DEFENDANT'S (NIGRO'S) ANSWERS

TO PLAINTIFF'S SECOND SET OF INTERROGATORIES

Q.1. For each examination, and with information for one examination separated from information another examination,

1a. State, in a list, the examination numbers of all unsuccessful examinees.

1b. State the names of all unsuccessful examinees along with their corresponding examination numbers, the law schools from which they graduated and along with the addresses used when the examinees last took the bar examination.

A.1 Objection. The information sought is confidential information contained in the records of the District of Columbia Court of Appeals.

Q.2 Did the Committee on Admissions or the Educational Testing Service (ETS) compute the value of the Multistate Bar Examination (MBE) equi-percentile score?

A.2 The Director of Testing for the National Conference of Bar Examiners computed the value of the MBE score under the equi-percentile method.

Q.3 Did the Committee or ETS determine the value of the MBE equi-percentile score for the District of Columbia Bar examination?

A.3 The Director of testing determines the value of the equi-percentile score based on the examination scores of the applicants sitting for the bar examination.

Q.4 For the February and July 1977 and February 1978 bar examinations only, list the MBE equi-percentile scores and underlying raw MBE scores.

A.4 Objection. The information sought is confidential information contained in the records of the District of Columbia Court of Appeals.

Q.5 Given a converted essay score of 70.5 and

a raw multistate score of 110, mathematically indicate the method by which you arrive at the combined score for those scores.

A.5 Essay scores are not converted. The MBE score is converted to the essay value.

Q.6 State for each examination in question, whether the MBE equi-percentile scores determined for the D.C. bar examination are the same as the scale MBE scores used by ETS to value raw MBE scores in general.

6a. If yes, indicate the years the scores were the same.

6b. If no, indicate, regarding the MBE equi-percentile score, the standard deviation from the total scaled MBE scores.

6c. If no, indicate, regarding the MBE equi-percentile score, the standard deviation from the total scaled MBE scores.

A.6 The D.C. Columbia Bar Examination did not use the scaled scores for the examinations in question.

6a. "Not Applicable."

6b. "Not Applicable."

6c. "Not Applicable."

Q.7 State whether the basic information regarding examinees, that is, names, examination numbers, addresses and passes and failures, or any part of this basis information for the times in question, is kept in a manual method, microfiche, or on computer. Indicate the basic information above along with the method by which it is kept by year. If said basic information was kept in different methods for any given year, state the information or part of the basic information and the method by which it is kept.

A.7 The information for the years 1977 and 1978 were kept manually.

DISTRICT OF COLUMBIA, SS:

Anthony Nigro, being first duly sworn, deposes and says that the foregoing answers to interrogatories are true and correct to the best of his knowledge, information and belief.

/s/Anthony Nigro

SUBSCRIBED AND SWORN TO before this 29th day of October, 1985.

/s/Priscilla S. Jameson

Notary Public

My Commission Expires May 14, 1990.

Respectfully Submitted,

LEFTWICH MOORE & DOUGLAS

/s/Lloyd N. Moore, Jr. Attorney for Defendants

1250 Eye Street, N.W. Suite 201 Washington,D.C. 20005 (202) 371-0500

APPENDIX BB

Secretary's Response to Request for Production and Inspection

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL	)	
Plaintiff,	)	Civil Action
v.	)	No. 81-2622
ANTHONY NIGRO, et al	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S FIRST REQUEST TO DEFENDANT ANTHONY NIGRO FOR PRODUCTION

OF DOCUMENTS AND THINGS AND FOR ENTRY TO THE COMMITTEE'S PREMISES FOR INSPECTION AND OTHER PURPOSES

The requested information does not exist. The Committee on Admissions does not "compile writing, graphs, and data compilations" of the nature set forth in Plaintiff's request.

Respectfully Submitted,

LEFTWICH MOORE & DOUGLAS

/s/ Lloyd N. Moore, Jr. Attorney for Defendants

1250 Eye Street, N.W. Washington, D.C. 20005

(202) 471-0500

APPENDIX CC

Bar Examiners' Response to First Interrogatories

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL	)	
Plaintiff,	)	Civil Action
v.	)	No. 81-2622
ANTHONY NIGRO, et al	)	
Defendants.	)	

RESPONSE TO PLAINTIFF'S INTERROGATORIES NOS. 7-14 to INDIVIDUAL DEFENDANTS OTHER THAN ANTHONY NIGRO

Q.7 Did you have an L.L.M. degree (Masters of Law) in the subject-matter area of your specific questions at the times stated in the first complete paragraph (1976 - 1981) on the prior page?

A.7 Objection. The only remaining paragraphs of the Amended Complaint (nos. 14-19) involve the assigning of examination numbers by the Committee on Admissions. The information sought by this question has no relevance at all to the allegations contained in paragraphs 14-19 inasmuch as the individual defendants, other than Anthony Nigro, are not involved in that process. See attached Affidavit of Anthony Nigro.

Q.8 If yes, give the date the degree was awarded and the institution that awarded the degree.

A.8 Objection. See Answer A.7.

Q.9 If you did not have an L.L.M. degree but had earned all the credits for the degree, state

the institution(s) of matriculation, the dates of matriculation and the hours received from each institution.

A.9 Objection. See Answer A.7.

Q.10 Was your professional reputation in the community that of an expert in the subject matter of your question?

A.10 Objection. See Answer A.7.

Q.11 Did you consider yourself an expert in the subject matter of your question?

A.11 Objection. See Answer A.7.

Q.12. If you did so consider yourself, upon what did you base your decision?

A.12 Objection. See Answer A.7.

Q.13 Name, along with docket number, twenty-four (24) local or federal cases, wherein you prepared the brief and your name appeared on the brief. (24 for each year mentioned)

Q.14 If you did not prepare twenty-four (24) briefs and your name did not appear on twenty-four briefs, name along with docket number, twenty-four (24) cases you argued each of the

years mentioned.

A.14 Objection. See Answer A.&.

Respectfully Submitted,

LEFTWICH MOORE & DOUGLAS

/s/Lloyd N. Moore, Jr. Attorney for Defendants

1250 Eye Street, N.W. Suite 201 Washington, D.C. 20005 (202)371-0500

APPENDIX DD

Affidavit of Anthony Nigro

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL	)	
Plaintiff,	)	Civil Action
v.	)	No. 81-2622
ANTHONY NIGRO, et al.	)	
Defendants.	)	

AFFIDAVIT OF ANTHONY NIGRO

Anthony Nigro, being first duly sworn under oath according to law, does hereby depose and state as follows:

1. That I am the Director of Admissions for the District of Columbia Court of Appeals.

(emphasis added)

2. That as such, it is my responsibility to oversee those employees of the District of Columbia Court of Appeals responsible for administratively processing applications for admission to the bar.

3. That the assigning of examination numbers to applicants with complete applications is an administrative function performed by those employees.

4. That examination numbers are randomly assigned without regard to the information contained in the applications.

5. That neither the Committee on Admissions as a whole nor individual members of the Committee on Admissions routinely review applications prior to the grading of the bar examinations.

6. That no member of the Committee on Admissions is involved in the assigning of examination numbers.

7. That the present application for admission to the bar does not solicit information

regarding the applicant's race. (See Attachment 1).

8. That the examination number assigned an applicant has no relationship to that applicant's race, nor are the employees of the District of Columbia Court of Appeals aware of the race of any applicant when examination numbers are assigned.

/s/ Anthony Nigro

Subscribed and sworn to before me this 28th day of March, 1985.

/s/Maria L. Narrison
Notary Public
P.G. County, State of Md.

My Commission Expires 7/1/86

APPENDIX EE

Partial Transcript of D.C. Committee On Admissions Chairman Re: Not Grading All Essay Answers, Before a seminar Update on Continuing Problems in Admissions to the Bar, May 20, 1977 & part of the record in D.C. Ct. of Appeals case no. 77-12105.

Question: What kind of grading system there is that allows people to fail with grades like 69.7, 69.9?

Response: Its a grading system which is a combination of the multistate exam and the essay exam. When we grade an essay exam we don't know what the score is on the multistate. We just grade our papers. They are sent to the Clerk with our grades, he has the multistate exams grades. If the person scored 140 on the multistate he passes them? (emphasis added)

Question: ...My question is given 500 papers to grade examining your questions in legal ethics which had 10 parts an average of 3 minutes to read a response will take you 5 hours a day for three months every day of the week, 7 days a week, do you spend that time grading papers?

Response: I can't answer that question but I could tell you what I do. Now the July exam which we just got--let's see February--the February exam I think we...I can't give you accurate figures but I would say one-third of the

exam papers are passed based on the multistate score without the need for reading the exams. I think about one-third of the papers. (emphasis added)

APPENDIX FF

Statement of Director of Testing, National Conference of Bar Examiners (NCBE) saying some states used 140 MBE as cut off without reading essay examinations.

Three states set a cut-off MBE score and do not read essay answers of applicants who make that score or above. In Pennsylvania the essay answers of applicants who make an MBE score of 130 pass the bar examination and their essay answers are not read. Another state follows a similar practice for applicants who make an MBE score of 135 or over, and New Jersey does not read the essay answers for those making over 140. This plan has the effect of relieving the bar examiners of the increasingly heavy burden of reading mountains of essay answers. The plan is based on the idea that applicants making

the cut-off or higher score would not have failed the essay portion of the examination.

The Bar Examiner

APPENDIX GG

Equipercentile and Scaled Scores for MBE in general and July, 1981 in particular

Notation: Since the July 1981 MBE was more difficult than the base test, the scaled score will be a few points higher than the raw score.

Scale Score	Equipercentile Score
188	100.0
187	100.0
186	100.0
185	100.0
184	100.0
183	99.9
***	***
150	68.8
149*	66.8*
148	62.7
147	60.6

Scale Score	Equipercentile Score
146	58.4
145	56.4
144	54.3
***	***
86	0.2
85	0.1
84	0.1
83	0.1
82	0.1
81	0.1
80	0.1
Below 80	0.1

The Bar Examiner

February 1982

APPENDIX HH

PREDETERMINED EXAMINATION NUMBERS ASSIGNED

BLACKS WHO FAILED BAR EXAMINATION

EXAM DATE	RANGE OF NUMBERS	SOME SPECIFIC NOS.
2-76	4300-4400	4347,4429,4465
7-76	4800-5100	4856,4857,5115
2-77	5510-5580	5518,5552,5573

Source: Court Cases, Personal Interviews/Black Examinees

APPENDIX II

Bar Examination Results

1976 - 1981

Exam Dates	Total Taking	Total # Passing	Total % Passing	Black-White % Passing
2-76	324	165	51%	B-3% W-98%
7-76	713	475	66.6%	B-1% W-97%
2-77	334	200	60%	B-2% W-95%
7-77	735	492	67.3%	
2-78	499	324	65%	
7-78	1352	953	70.5%	
2-79	757	402	53.1%	
7-79	1630	1064	65.3%	B-.4%W-98%
2-80	949	617	65.1%	
7-80	1742	1083	62.2%	
2-81	1074	573	53.4%	
7-81	1945	1123	57.7%	B-.6%W-98%

Sources: Newspapers, Washington Daily Law Reporter, The Bar Examiner

A-90 APPENDIX JJ

February 1977 D.C. Bar Examination Grading Sheet

Applicant Number:	Value	Score
Mr. Gardner's Questions		
1. Negotiable Instruments	10	5
2. Negotiable Instruments	10	5
3. Agency	10	9
Total	30	19
Mr. Mackall's Questions		
1. Equity	10	6
2. Corporations	10	7
3. Partnerships	10	8
Total	30	21
Mr. Hourihan's Questions		
1. Conflict of Law	15	12
2. Wills & Estates	15	13
Total	30	25
Mr. Stein's Questions		
1. Legal Ethics	6	3
2. Legal Ethics	3	2
3. Domestics Relations	9	8
4. Legal Ethics	3	1
5. Legal Ethics	6	2

6. Legal Ethics	3	1
Total	30	17

Mr. Steele's Questions

1. Practice & Pleadings	15	12
2. Practice & Pleadings	5	5
3. Practice & Pleadings	10	10
	30	27

Miss Dobres' Questions

1. Administrative Law	10	5
2. Tax Law	10	6
3. Tax Law	10	7
Total	30	18
Essay Total	180	127
Essay Score	100	70.5

Multistate Bar Examination

1. Constitutional Law	30	15
2. Contracts	40	23
3. Criminal Law	30	16
4. Evidence	30	18
5. Real Property	30	17
6. Torts	40	21
Total Raw Score	200	110

Essay Score 100	70.5
*MBE Equi-Percentile Score 100	66.3
*COMBINED SCORE 100	68.4

APPENDIX KK

REPORT TO NCBE

ADMISSION TO BAR BY STATE (1980

St.	1980 Exam	No. Tak'ng	No. Pas'ng	% Pas'ng	Tot. Tak'ng	Tot. Pas'ng	Tot. Pas'ng ABA Sch
COL	Feb	308	246	80%			
	July	577	399	69%	885	645	645
CON	Feb	259	181	70%			
	July	585	385	66%	844	566	566
DEL	Feb	93	76	82%			
	July	4	4	100%	97	80	80
*DC	Feb	948	618	65%			
	July	1740	1153	66%	2688	1771	1750
FLA	N/A						
GA	Feb	1451	646	45%			
	July	1074	297	28%	2525	943	695

Source: The Bar Examiner

Evanna Powell, Pro se
5749 5th Street, N.E.
Washington, D.C. 20011
529-2773

AFFIDAVIT OF SERVICE

CITY OF: Washington

STATE OF: District of Columbia

I, Evanna Powell, being first duly sworn, state that three copies of the Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit were mailed, with prepaid postage, this day of , 198 , to

Lloyd N. Moore, Jr.,
Attorney for Defendants
Leftwich Moore & Douglas
1250 Eye Street, N.W.
Suite 201
Washington, D.C. 20005

Evanna Powell, Pro se
5749 5th Street, N.E.
Washington, D.C. 20011
529-2773

Subscribed and sworn to before me this day of , 198 .

Notary Public

Supreme Court, U.S.
FILED
JAN 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 88-1091

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EVANNA POWELL,
Petitioner,

VERSUS

ANTHONY NIGRO, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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1250 Eye Street, N.W.
Suite 600
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Counsel for Respondents

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STATEMENT OF THE CASE

Procedural Background

The route by which this case has arrived at this juncture has been a circuitous and arduous one. Petitioner, Evanna Powell, was unsuccessful on the February 1976, July 1976, February 1977, July 1977, February 1978, July 1978, February 1979, July 1979 and February 1981 examinations for admission to the Bar of the District of Columbia. In 1979, Ms. Powell filed a Freedom of Information Act action in federal district court. The suit was dismissed for failure to state a claim upon which relief could be granted. Powell v. Nigro, No. 79-3208 (D.D.C. Jan 25, 1980). The United States Court of Appeals for the District of Columbia Circuit upheld the district court's decision on appeal. Powell v. Nigro, No. 80-1147 (D.C. Cir. May 20, 1980). Ms. Powell's subsequent petition for certiorari was denied by this Court. Powell v. Nigro, No. 79-2057 (Dec. 1, 1980).

The present action was then initiated by Ms. Powell in October 1981. The suit was filed originally against several past and present

members of the District of Columbia Court of Appeals Committee on Admissions (hereinafter the "Committee") alleging that the manner in which the District of Columbia bar examination was administered was contrary to the requirements of the due process and equal protection clauses of the Fifth Amendment and also violated 42 U.S.C. § 1983.

On July 28, 1982, the Honorable John Lewis Smith, Jr., of the United States District Court for the District of Columbia, issued a memorandum order dismissing Ms. Powell's case for lack of subject matter jurisdiction. An appeal was docketed with the United States Court of Appeals for the District of Columbia Circuit. In light of the United States Supreme Court's decision in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), however, the Court of Appeals remanded the case to the district court for reconsideration on May 11, 1983. Powell v. Nigro, No. 82-2020 (D.C. Cir. May 11, 1983).

On remand, Judge Smith, on November 14, 1983, issued a Memorandum and Order that dismissed Ms. Powell's individual particularized claims for lack of subject-matter jurisdiction. The memorandum and order, however, permitted those claims which constituted a broad challenge to the constitutionality of the District of Columbia's bar examination process to proceed.

The defendants subsequently petitioned the district court to extend its protective order of January 17, 1984, with respect to Ms. Powell's first set of interrogatories. The defendants argued that to respond to such interrogatories would be extremely burdensome. They also renewed their motion to dismiss, this time on the basis of immunity, and sought to substitute the Committee as the party defendant. On January 16, 1985, Judge Smith ordered that the individual Committee members were entitled to absolute immunity from all of Ms. Powell's claims that sought money damages, except for those contained in paragraphs 14 and 19 of her complaint which related to the assignment of

test numbers to bar applicants. With respect to the claims which sought equitable relief, Judge Smith ruled that the individual Committee members should be dismissed as parties, and that the Committee should be substituted in their place. Finally, he determined that the January 17, 1984 protective order should not be extended and ordered the defendants to respond to interrogatories Nos. 7-14. Ms. Powell unsuccessfully petitioned the district court to alter its judgment dismissing certain counts and substituting the Committee as a party. A notice of appeal was filed in the United States Court of Appeals for the District of Columbia Circuit on March 15, 1985.

On April 3, 1985, the Court of Appeals sua sponte raised the issue of whether it had subject matter jurisdiction over Ms. Powell's appeal and ordered her to show cause as to why the appeal should not be dismissed. The appeal was dismissed for lack of jurisdiction on May 20, 1985.

The defendants renewed their motion for summary judgment in the district court on September 19, 1985, alleging that there were no material facts at issue in the case and that, as a matter of law, they were entitled to judgment. On November 13, 1985, Ms. Powell filed a motion for judgment of default on the basis that the defendants' answers to her interrogatories and their responses to her request for production of documents and request for entry to inspect and copy documents were inaccurate, incomplete, evasive or without a statutory basis for exemption. The district court denied Ms. Powell's motion in an order issued September 30, 1987. That same day, Judge Smith granted the defendants' motion for summary judgment and dismissed all of Ms. Powell's remaining claims.

On October 29, 1987, Ms. Powell instituted an appeal in the United States Court of Appeals for the District of Columbia Circuit seeking review of the district court's orders dated January 17, 1984, January 16, 1985, and September 30, 1987.

The respondents, on December 18, 1987, filed a motion seeking summary affirmance of the district court's orders that were listed in Ms. Powell's notice of appeal. On that same date, Ms. Powell filed a motion requesting summary reversal of the district court's January 16, 1985 order dismissing the claims against the individual members of the Committee that sought money damages and the September 30, 1987 order granting summary judgment.

On June 6, 1988, the Court of Appeals issued an order granting the Respondents' motion for summary affirmance and denying the Petitioner's motions for summary reversal. On June 16, 1988, Ms. Powell notified the Court of Appeals that she did not intend to petition for a rehearing.

Following this Court's decision in Watson v. Ft. Worth Bank & Trust, 108 S.Ct. 2777 (1988), announced on June 29, 1988, however, the Petitioner, on July 6, 1988, filed a notice of the Watson decision with the Court of Appeals. Ms. Powell requested that the Court of Appeals

either decide her case in conformity with the disparate impact analysis set forth in Watson, or remand the case with instructions.

Statement of the Facts

In her complaint, Ms. Powell claimed that the individual named members of the Committee violated the due process and equal protection clauses of the Fifth Amendment as well as 42 U.S.C. § 1983. These assertions were based upon Ms. Powell's allegations that the Committee had no ascertainable standard for grading bar examinations; that the bar examinations were not validated; that the question on the bar application regarding the number of times an applicant had unsuccessfully taken the bar examination was used to prejudge an applicant's competency to practice law; that the examination numbers assigned to applicants were used to predetermine examination scores on the basis of the applicant's race; and that the Committee had no ascertainable standard in setting what constitutes a passing score when combining the

multi-state and essay portions of the bar examination.

The record in this case uncontrovertibly establishes, however, that the Petitioner's allegations are merely bold assertions unsupported by any factual basis. The district court found and the pleadings and papers filed in this matter as well as the record herein, unequivocally establish that Ms. Powell's contentions were without merit and had no factual basis. The application that individuals seeking admission to the Bar of the District of Columbia by examination are required to submit to the Committee does not inquire into an applicant's race. Neither in the application process nor otherwise does the Committee solicit information from an applicant regarding his or her race. In the absence of knowledge of an applicant's race, it is impossible for the Committee to single out individual applicants for disparate treatment on the basis of their race.

Pursuant to Rule 46(b)(7) of the Rules of the District of Columbia Court of Appeals, each applicant is furnished with an examination number. It is this number and not their name that applicants are required to place on their examination papers. The numbers are randomly assigned without regard to the contents of an individual's application. The numbers are not selected by the bar examiners but instead are assigned by employees of the District of Columbia Court of Appeals who are responsible for the administrative processing of applications. Under subsection (b)(7) of Rule 46, the disclosure of an applicant's number is prohibited. Thus, while the examinations are being graded, the examiners are not privy to an applicant's name, race or prior bar examination history.

ARGUMENT

. Petitioner erroneously contends that the decision of the Court of Appeals in this matter was contrary to this Court's recent decision in Watson v. Ft. Worth Bank & Trust, 108 S.Ct. 2777

(1988), and in conflict with its own decision in Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987). The Court in Watson, as Petitioner accurately noted, found that, in the context of certain forms of employment discrimination, disparate impact analysis is an appropriate vehicle of inquiry. The language of Watson was focused, however, on employment discrimination (the case was brought under Title VII of the Civil Rights Act of 1964, as amended), and is therefore not directly applicable to the discrimination alleged by Ms. Powell. Similarly the decision of the District of Columbia Circuit in Hopkins was also addressed to an allegation of employment discrimination.

The thrust of Petitioner's argument, as it relates to these cases, appears to be that the evidence, both statistical and otherwise, that she submitted was sufficient to establish a prima facie case, thereby shifting the burden to the Committee to come forward with evidence that the actions alleged by Ms. Powell were not discriminatory. The flaw in Ms. Powell's

argument, however, is her assumption that she had made out a prima facie case of discrimination. Two courts have reviewed the "evidence" submitted by the Petitioner to substantiate her claim of discrimination and both have found it lacking. After reviewing the record, the district court in its order of September 30, 1987, found that Ms Powell's "allegation that the members of the Committee discriminate against Black applicants" was "entirely void of merit." (Petition For Writ of Certiorari Appendix [hereinafter "Appendix"] at A-8). The record unambiguously discloses that the Committee does not solicit information regarding the race of applicants during the admission process and that, even if it did, the method by which examination numbers are assigned to applicants would make it impossible for the members of the Committee to track applicants on the basis of their race.

Summary Judgment Was Appropriate As To Petitioner's Equal Protection Claims

Ms. Powell initially claims that the bar examiners utilize the bar examination as a

devise to purposefully discriminate against prospective black attorneys on the basis of race. In support of her contention she alleges that; (1) there is no ascertainable standard for grading the bar examination; (2) a disproportionate percentage of blacks have previously been unsuccessful on the bar examination; and (3) the Committee has predetermined, on the basis of examination number assigned, that a disproportionate percentage of blacks would be unsuccessful.

Respondents have consistently denied that they harbor any racial animus, and have also affirmatively demonstrated their inability to discover an applicant's race during the grading process. Under Rule 46(b)(7) of the Rules of the District of Columbia Court of Appeals, each applicant is given an examination number. Only that number and not the name of the applicant is placed on the examination papers. The examination numbers are assigned by employees of the District of Columbia Court of Appeals on a random basis, without regard to any information

provided in the applications. Affidavit of Anthony Nigro dated March 28, 1985 (Appendix at A-82 to A-84). The members of the Committee do not participate in the assigning of examination numbers. Id. at A-83. Further disclosure of the examination number of any applicant is prohibited. D.C. Ct. App. R. 46(b)(7) of the Court Rules of the District of Columbia Court of Appeals. Anthony Nigro, Director of the Committee on Admissions, has indicated that the Committee does not solicit, through the application process or otherwise, information to the race of applicants. Appendix at A-83 to A-84. The Committee does not know the race of an applicant when he or she is assigned an examination number. Consequently, the bar examiners have no knowledge of, nor any means of learning the race of a person whose paper they are grading.

The Committee has demonstrated not only the absence of any discriminatory motivation on its part of the Committee, but also the inability of the Committee to effectuate any predisposition

of examination results such as that claimed by Ms. Powell. Given this showing of the absence of any genuine issue of material fact as to the examiner's direct access to information concerning an examinee's race during grading, summary judgment as to Ms. Powell's claims of intentional discrimination claims was warranted. See Tyler v. Vickery, 517 F.2d 1089, 1093 (5th Cir. 1975); Feldman v. State Board of Bar Examiners, 438 F.2d 699, 701 (8th Cir. 1971). Absent discriminatory conduct, discriminatory intent, even if it were found to exist, is an immaterial issue of fact. Tyler v. Vickery, 517 F.2d at 1093.

Ms. Powell also contends that, irrespective of intent, the District of Columbia Bar examination inherently denies equal protection of the law to black applicants because of the disproportionate rate at which they fail the examination. Ms. Powell, however, fails to even make out a prima facie case that the District of Columbia bar examination has a disparate impact on blacks.

As noted previously, the Committee does not solicit information as to the race of applicants. Thus, even the Committee does not know what percentage of black applicants who fail any bar examination.

Even assuming, arguendo, that the District of Columbia Bar examination has a disproportionate impact on blacks, such impact, standing alone, does not serve to create a classification based on race which is necessary to trigger strict judicial scrutiny. Washington v. Davis, 426 U.S. 229 (1976); Jefferson v. Hackney, 406 U.S. 535 (1972); McClaughlin v. Florida, 379 U.S. 194 (1964); Tyler v. Vickery, 517 F.2d at 1099. Claims based on asserted violations of the Fifth Amendment are required to show not only a discriminatory impact but also discriminatory intent Washington v. Davis, 426 at 246; Richardson v. Pennsylvania Department of Health, 561 F.2d 489 (3d Cir. 1977). Respondents have clearly negated any inference that they discriminated on the basis of race.

Since the District of Columbia bar examination does not establish a suspect racial classification, there is no legal basis for applying the compelling state interest test, and the proper standard of review is the rational relationship test. Tyler v. Vickery, 517 F.2d at 1101. In Schware v. Board of Examiners, this Court held that "(a) state can require high standards of qualification such as good moral character or proficiency in its law before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." Schware v. Board of Examiners, 353 U.S. 232, 239 (1957). Courts uniformly have held that the bar examination has a rational relationship to an applicant's fitness and capacity to practice law. Tyler v. Vickery, 517 F.2d at 1101; Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474, 477 (7th Cir. 1974); Feldman v. State Board of Law Examiners, 438 F.2d 699, 705 (8th Cir. 1971); Chaney v. State Bar of California, 386 F.2d 962,

964 (9th Cir. 1967); Harper v. District of Columbia Comm. on Admissions, 375 A.2d 25 (D.C. 1977).

Ms. Powell argues, that there is no ascertainable standard for grading the bar examination and that this lack of an applicable standard has caused grades to be assigned in an arbitrary and capricious manner. In essence, she is contending that the bar examination is irrationally administered because the outcome depends so heavily on the subjective grading judgments of the examiners. Subjective grading is a necessary corollary to the administration of essay-type questions, however, and therefore an attack on subjective grading, must include the allegation that the use of an essay examination is itself irrational. This contention has been uniformly rejected by all courts which have considered it. See, e.g., Tyler v. Vickery, 517 F.2d at 1102; Whitfield v. Illinois Board of Law Examiners, 504 F.2d at 477; Feldman v. State Board of Law Examiners, 438 F.2d at 705; Chaney v. State Bar of

California, 386 F.2d at 964. An essay-type examination ensured that applicants have the capacity to analyze general legal situations and apply abstract legal principles -- skills which a practicing attorney must possess. It provides an indication as to the possession, or lack thereof, of knowledge in the legal fields to which the questions relate. Ms. Powell's assertions do not raise an issue of material fact as to whether the bar examination is irrational. As such, Respondents were entitled to judgment as a matter of law as to equal protection claims.

Summary Judgment Was Appropriate As To Petitioner's Due Process Claims

Ms. Powell also contends that she has been denied due process of law in violation of the Fifth Amendment of the United States Constitution. Her alleged facts which support this contention include, (1) that the procedures for review of a failing grade are insufficient; (2) that the bar examination--used to measure one's proficiency in law -- has not been validated; (3) that the examiners who

judged the applicant's proficiency in law were not qualified to do so; (4) that the Committee has no ascertainable standard for determining the combined essay and multi-state examination scores or the value of prior multi-state examination scores.

Under Rule 46(b)(12) of the Rules of the District of Columbia Court of Appeals, unsuccessful applicants are entitled to review the essay section of the examination and the examiner's questions and comments thereto. The applicant may then submit a petition for regrading setting forth the reasons in support thereof. An applicant, who remains unsuccessful after the petition for regrading is disposed of, can petition for a final review by two new examiners. See Harper v. Dist. of Columbia Comm. on Admissions, 375 A.2d at 26-27.

Petitioner argues that this "paper review" constitutes a denial of due process. Ms. Powell asserts that she was not afforded an opportunity to directly confront the examiners, not given reasons why her answers were wrong,

and not allowed to compare her answers with the answers of successful examinees.

While the opportunity to be heard is generally considered a fundamental component of due process, entitlement to a hearing does not automatically flow from a finding that procedural due process is applicable. North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908). Whether due process requires a particular procedure in a given situation must be determined by balancing the individual's interest in avoiding the loss which lack of the procedure inflicts upon him, against the interests which the government seeks to advance by denying it. Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970). While Petitioner's interest might be a weighty one in determining whether due process protections are applicable, it militates in favor of a hearing only if a hearing is demonstrably a more efficacious means of safeguarding that interest than current procedures provide.

Unsuccessful applicants are allowed to retake the bar examination at its next administration. Reexamination provides an adequate means of exposing grading errors. Tyler v. Vickery, 517 F.2d at 1104; Whitfield v. Illinois Board of Law Examiners, 504 F.2d at 478; Brewer v. Wegman, 691 F.2d 216, 217 (5th Cir. 1982). Upon reexamination, an individual is entitled to have his paper graded by the same standards as those of everyone else, and if she or he passes, to be admitted on precisely the same basis as an applicant who had not previously taken the examination. Even making the generous assumption that one out of every hundred applicants who take the bar examination fails when they should have passed due to arbitrary grading, the probability that the same individual would be the victim of error after two reexaminations is infinitesimal.

Furthermore, since regularly scheduled examinations are held every six months, and each administration produces scores of unsuccessful applications who would be entitled

to hearings, it would be unlikely that providing a hearing would afford significantly quicker relief to an erroneously failed applicant than the right to retake the examination at the next administration. Moreover, requiring a hearing for each of these applicants would place an intolerable burden upon the bar examiners, especially when one considers that bar examiners are not full time administrators but are practicing attorneys. Tyler v. Vickery, 517 F.2d at 1105; Whitfield v. Illinois State Board of Law Examiners, 504 F.2d at 478.

The Committee's current procedural safeguards are certainly effective in exposing grading errors. Applicants are allowed not just one, but two opportunities for regrading. Additional procedures would not necessarily effectuate a more efficacious means of safeguarding applicant's interests, especially in light of the burden they would entail. Likewise, the opportunity to compare one's examination with others would be virtually meaningless unless one are also able to confront

the bar examiners and obtain from them explanations of their grades.

Ms. Powell also contends that the bar examination -- used to measure one's proficiency in law -- has not been validated pursuant to court established criteria for test validation, and hence, she has been denied due process of law. However, for purposes of applying the due process clause of the Fifth Amendment, it is not necessary that examinations in general, or the bar examination in particular, be professionally validated. Washington v. Davis, 426 U.S. 229 (1977); Richardson v. Pennsylvania Department of Health, 561 F.2d 489 (3d Cir. 1977). All that is constitutionally required, is that the bar examination have a rational relationship to the practice of law. As noted supra, courts have uniformly held that bar examinations meet this standard.

Ms. Powell asserts that she was denied due process of the law because the examiners who judged her proficiency in the law were not qualified to do so. She contends that the bar

examiners were neither specialists nor had they received Masters of Law degrees in the area of their respective questions. These disputed fact issues, which Ms. Powell has claimed necessitate a trial, are at bottom only claims that the examination could be improved. The argument overlooks one of the most fundamental distinctions between the strict scrutiny and rational relationship standards of review -- the relevance of the availability of alternative means. A party defending a classification subject to strict judicial scrutiny must demonstrate that there is no other available means which impinges less on the protected interest involved. See, e.g., Shelton v. Tucker, 364 U.S. 479, 488 (1960). The focus of the rational relationship test, however, is not whether a party has superior means available to accomplish its objectives, but whether the means it has chosen are reasonable. No court has held that bar examiners hold LL.M degrees or must be specialists in their field of questioning. Presently, bar examiners in the District of

Columbia are practicing attorneys appointed by order of the District of Columbia Court of Appeals. These examiners undeniably have the legal experience to determine whether an applicant possess the minimal level of competency required to practice law. Viewed from this perspective, Ms. Powell's asserted factual issues are simply not material.

Finally, Petitioner contends that she was denied due process of law because the Committee has no ascertainable standard for determining the combined score when the essay and multi-state examination scores are merged or for determining the value of a prior multi-state examination score that is used on subsequent examinations. As with her previous claims, Ms. Powell has failed to raise a genuine issue of material fact.

Both the essay and the multi-state bar examination portions of the examination are designed to assess the legal competence of applicants. The "equi-percentile" method is used both to determine the combined score on

each examination when the essay score and multi-state score are combined, and to determine the value of a prior multi-state bar examination score used on a subsequent bar examination. By arguing that the Committee does not have an ascertainable standard for determining the combined score, Ms. Powell essentially is contending that the bar examination, in its present form, is an irrational device for measuring one's proficiency in the law. This contention has been unanimously rejected by all courts which have considered it. Tyler v. Vickery, 517 F.2d at 1102; Whitfield v. Illinois Board of Law Examiners, 504 F.2d at 477; Feldman v. State Board of Law Examiners, 438 F.2d at 703.

Ms. Powell has presented no genuine issue of material fact and Respondents were entitled to judgment as a matter of law as to the due process claims. The Court of Appeals' summary affirmance was therefore appropriate.

Summary Judgment Was Appropriate As To Petitioner's 42 U.S.C. § 1983 Claims

Ms. Powell's claim brought pursuant to 42 U.S.C. § 1983 must fail for the same reasons her equal protection and due process claims failed. Powell v. Nigro, No. 81-2622, Memorandum at 13 (D.D.C. Sept. 30, 1987). Constitutional claims brought pursuant to 42 U.S.C. § 1983 require intentional discrimination. Washington v. Davis, 426 U.S. 229 (1977); Richardson v. Pennsylvania Department of Health, 561 F.2d 489 (3d Cir. 1977). Ms. Powell is therefore required not only to prove discriminatory impact, but also a discriminatory intent on the part of Respondents. Ms. Powell has failed to show the existence of any genuine issue of material fact as to the Respondents' ability to effectuate discriminatory intent and thus has failed to assert a violation of her constitutional or statutory rights actionable under 42 U.S.C. § 1983. Moreover, Respondents have negated any possible inference of discrimination by showing that (1) the Committee does not solicit information from applicants as

to race, and (2) Committee members do not have access to information regarding the race of applicants when grading the examinations. Respondents were entitled to judgment as a matter of law as to Ms. Powell's Section 1983 claims, and the Court of Appeals' grant of summary affirmance was appropriate.

Respondents Are Entitled To Absolute Immunity For Certain Of Their Actions

The individual members of the Committee, as quasi-judicial officials, are entitled to the same absolute immunity enjoyed by judges with respect to matters that fall within their judicial jurisdiction. Stump v. Sparkman, 435 U.S. 349 (1978). The Committee members are entitled to such immunity, because in administering the District of Columbia bar examination and determining the fitness of applicants to practice law, they perform a judicial faction on behalf of the District of Columbia Court of Appeals. Richardson v. McFadden, 563 F.2d 1130, 1132 (4th Cir. 1977)(Hall, J. concurring). In addition, when the Committee members are performing duties

delegated to them by the District of Columbia Court of Appeals and such duties are undertaken in conformance with the standards set by the Court, then the Committee members are also entitled to absolute immunity.

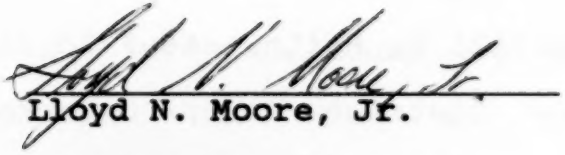
Ms. Powell's protestations to the contrary, the record in this case unambiguously indicates that the Committee and its members have consistently complied with all of Ms. Powell's discovery requests that were not limited by protective orders issued by the district court or to which they did not interpose objections. More importantly, Ms. Powell failed to request an order from the district court compelling Respondents to answer her interrogatories to which they had raised on objection or compelling inspection. In the absence of such an order, Ms. Powell is precluded from obtaining the relief specified in Rule 37(b)(2)(C).

The Granting Of A Partial Protective Order With Respect To Petitioner's First Set Of Interrogatories Was Not Error

Although the scope accorded to discovery is broad, it is not without its boundaries. Doe v. District of Columbia, 695 F.2d 1115 (D.C. Cir. 1983). In determining the appropriate scope to accord discovery in a particular case, courts are afforded wide discretion to fashion an equitable solution and are subject to reversal only upon a finding of abuse of discretion. Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981). The District Court undertook a careful and reasoned analysis of the burdens and benefits that would result to each party before imposing the protective order. Given the procedural posture of the litigation when the protective order was issued in this case and the potentially expansive nature of Ms. Powell's initial discovery requests, the determination that a limited protective order should issue was not an abuse of discretion and thus was appropriately affirmed by the Court.

CONCLUSION

Respondents respectfully that this Court deny the petition to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit issued in this matter on August 25, 1988.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition was mailed this 31st day of January, 1989, first class postage prepaid, to:

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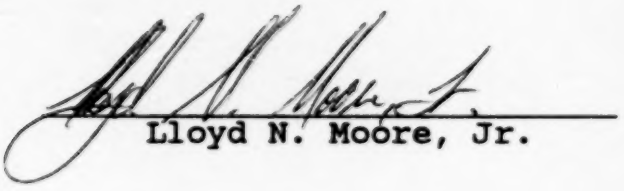

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